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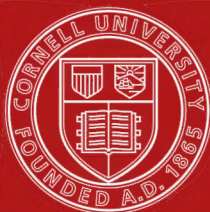
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THE GENERAL PRINCIPLES
OF THE
LAW OF EVIDENCE

IN THEIR APPLICATION TO
THE TRIAL OF CRIMINAL CASES
AT COMMON LAW
AND
UNDER THE CRIMINAL CODES
OF THE SEVERAL STATES.

IN ONE VOLUME.

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PREFACE.

In concluding the examination of a subject which has engrossed my attention for many years, a few explanatory paragraphs as to the scope and nature of the undertaking will gratify one individual at least, and find their warrant for appearing, in an immemorial custom that now has all the force of a vested right.

The only work published in this country avowedly dedicated to the consideration of criminal evidence, is Dr. Wharton's exceedingly able treatise written in 1846, and which reached its last edition in 1884. This treatise while in every way an admirable presentation of the subject as reflected by the learning of fifty years ago, has encountered the infelicities that time imposes upon every text-book, however meritorious and sufficiently emphasizes in its present condition the urgent call for a revised and modernized view of a great subject, and a re-examination of former postulates that are now pronounced untenable.

It is universally conceded that the law of evidence in many of its relations to the rules of pleading and practice has assumed, within the last twenty years, an importance but indifferently apprehended by early writers. The laborious researches of the celebrated commission which compiled the Anglo-Indian Evidence Act, resulted in a new analysis and classification of the law. These results have met with very general indorsement by both the American and English judiciary "who now regard the law of evidence as respects the relevancy of facts from the standpoint of inductive logic, as systematized and refined by John Stuart Mill. The relevancy of evidence is considered in their view, and properly so, as a particular case of the process of induction; the process of inferring the unknown from the known. A fact, if it is to be received in evidence as relevant, must base its claims to consideration by the jury, upon grounds identical with those upon which a fact must claim consideration at the hands of a scientist when investigating physical facts. It must be a fact having a logical place in the chain of causation with reference to the ultimate fact to be proved." Commissioners Report, Proposed Code of Evidence of the state of New York.

This attribute of "relevancy" is entirely controlled by the principles that govern logical analysis, while it adjusts itself to the emergencies of the particular case at bar through the application of rules that are in no wise fettered by either mere precedent or formula. In the suggestive language of Dr. Wharton: "It is now determined by the laws, not of formal jurisprudence, but of free logic; and in obedience to this conviction we have a series of recent rulings based on logical as distinguished from technically juridical grounds."

The rapid expansion of the science of evidence under the advantages derived from past experience and investigation, has subjected many of its exclusionary rules, especially, to the crucial test of both forensic and judicial review, resulting in such a renovation of early theories as to make a complete re-examination of the entire law not only desirable but necessary. One difficulty is obvious; so long as the administration of remedial and punitive justice reposes in numerous independent tribunals, state and Federal, it is inevitable that many mooted questions, especially those of first impression, will meet with discordant interpretations that ultimately engender such permanent contradiction as to repel all hope of reconciliation. In such cases it has been my endeavor to indicate the reasoning that contributes to this result, by apposite quotations from the sustaining authorities, accompanied by such cautionary suggestions as seem desirable, remembering that contradictory decisions are frequently a useful warning against assuming too much or generalizing too far.

As in the preceding volumes the writer studiously avoids any obtrusion of his personal views, and the constant endeavor is to state what the law of evidence is, first in its statutory phases, and secondly as expounded and interpreted by our courts of last resort, acting upon the impulse given by logical conclusions assumed after careful examination. In the endeavor to give comprehensiveness and certitude to this exposition, I have had recourse to the entire mass of criminal adjudication as preserved in our various reports, state and Federal, while the leading law periodicals of the period have contributed their quota of information to the same result. Thousands of cases have been critically examined and classified, and every principle implicated with the scheme of evidence in these numerous decisions has been examined, announced and digested.

The pivotal concept throughout has been to display the entire range of evidentiary law under its modern aspect—to disclose in the simplest manner possible the principles that underlie the recent adjudications, with the logic sustaining them, and to place before the practitioner an assistant that will be found responsive to every call that the emergencies of a hotly contested case may reasonably demand.

My further endeavor has been to emancipate the text as far as possible from metaphysical discussion and refined theorizing and to place every assertion beyond the reach of suspicion, by citing in its support the deliberate utterance of some tribunal entitled to respect. In the accomplishment of this design I have at rare intervals encountered contradictions of the character referred to. Frequently these discrepancies of view in the various jurisdictions arise from divergencies in the organic or statutory law that inspire antagonistic rulings that must be recognized as necessities of the situation and which must both be accepted and treated accordingly.

Following numerous precedents the subject is treated under five subdivisions or parts.

Part I. considers criminal evidence in its general relations to the criminal law. In many instances the rule announced is equally applicable to the trial of a civil case, and in rare instances taken *in extenso* from the preceding volumes on Civil Evidence. Cross-references are frequently made to these volumes in order to avoid a duplication of statement, and to economize the space, which the extent and scope of the undertaking requires.

Part II., discusses the instrumentalities of evidence and is an extended presentation of what is frequently regarded by adroit practitioners as the most vexatious phase of our entire subject.

Part III., exhibits the evidence of the prosecution, under the recitals of the indictment, and is an attempt to faithfully portray the rules of evidence that are sanctioned by authority in order to secure the conviction of the accused.

Part IV., is devoted to defensive evidence, and is expository of those rules that assist in determining the innocence of the defendant.

Part V., is a somewhat ambitious attempt to simplify and lucidly state the more intricate problems of evidentiary law as found in the trial of specific offenses. Here I have endeavored

to italicise all the deviations from standard rule and to clearly indicate the logic and effect of these deviations both upon the law and upon the practice.

As an aspirant for favorable consideration I shall not rely either upon the generosity or the indifference of the public, but rather confidently depend upon its sense of fairness and candor. Upon this I base a hope that the merits of my undertaking will be found to far outweigh its imperfections, and that its deficiencies and crudities will be attributed, in part at least, to the perplexities imposed by the extended treatment of a vast subject, many of the subordinate phases of which are still involved in contradiction and obscurity, while others still are without the least aid from judicial interpretation.

It is believed that a perusal of this final volume will justify a conclusion that the treatment accorded to the subject has been practical, accurate and modern, as well as exhaustive and discriminating.

FRANK S. RICE.

Rochester, May 15th, 1893.

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LAW OF EVIDENCE

IN

CRIMINAL CASES.

PART I.

DISCUSSION AND SUMMARY OF GENERAL RULES.

CHAPTER I.

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- 8. *What is Criminal Law.*
- 9. *Principals and Accessories.*

§ 1. **Preliminary Suggestions.**—The object of all evidence under every scheme of jurisprudence that has ever been recognized as worthy of that name has been the evolution of truth in its entirety, subject only to the limitation that it must be relevant to the issue tried. It follows as an obvious corollary that the same rules that are designed for the development of truth in a civil action apply with equal force to a criminal case. A step further on will lead to the assertion that all evidentiary matter involved under such subdivisions as are comprehended in judicial notice, prima facie evidence, best and secondary evidence, hearsay, relevancy, etc., sustain the same relation in both classes of cases. Indeed, it may be affirmed that criminal evidence differs from civil evidence merely in matters of specialized application; and the most minute investigation of our theme will merely disclose

the fact that our concern is with the modification, the deflections, the singularities,—the aberrations, if you will,—that experience in criminal prosecutions has engrafted upon the rule of civil evidence. It is to the study of these specialized applications that it is the design and import of this work to assist in directing.

The foregoing paragraph, in the reasoning it contains, will be sufficient justification in the present work for the somewhat meagre treatment accorded to those great sub-headings of the general law of evidence which, by virtue of their apt and well recognized application to both civil and criminal evidence, have been accorded extended treatment in the volumes already before the profession.

By means of this abridgment, it is hoped to bring the thorough treatment of the entire scheme of civil and criminal evidence within the compass of three volumes; and where an apparent deficiency exists in the treatment, let the critic investigate the entire text before proceeding to condemn. These remarks are especially pertinent in view of chapter 1, Civil Evidence. In the present volume most if not all the topics composing those chapters were carefully amplified under similar headings in volume 1, Civil Evidence, which will be found to supplement the examination here given in many desirable ways.

§ 2. What Distinguishes Criminal from Civil Evidence.—

What are the distinguishing characteristics between criminal and civil evidence? Is the line of cleavage so well defined as to warrant a separate treatment, and upon what lines should such treatment be extended? The appearance of this work will indicate at least the editorial view, which is accompanied however with the assertion that it is the weight of evidence that creates and maintains the fundamental distinction.

This distinction is further emphasized by the fact that criminal prosecutions involve different applications of the law of evidence from those in vogue in civil cases, where the parties approach the contention indicated by the pleadings upon terms of proximate equality with perhaps a slight presumption in favor of the plaintiff, who having committed himself to specific allegations of injury is charitably presumed to be in a situation to prove his case. In criminal prosecutions, however, there is an antipodal relation between the primacy accorded to the state, with all the paraphernalia of the law to maintain its dignity and sustain its cause, and the alleged offender, often friendless and in penury; and always

laboring under the derogatory imputations that a criminal indictment is presumed to transmit. In this immediate connection, it is appropriate to outline the last and greatest distinction that characterizes civil and criminal evidence. The law, in its tender solicitude for the life and liberty of the citizen, seeks to equalize the inequalities between the state and the accused, by conjuring up as a staunch ally of the accused, one who accompanies him from the moment of apprehension to the moment of conviction, one who is doubly armed with those mighty bulwarks of the criminal law—*presumption of innocence and reasonable doubt*.

To overcome this presumption, and to dispel this doubt, the prosecution must direct its energy. It must prove every averment of its indictment. It must establish its case by convincing testimony. It must assume the integrity of the accused; and substantiate its position without the aid of his testimony. Through all the mutations of the trial, the burden of proof is with the state.

These peculiar characteristics of criminal evidence generate in their turn a hoard of peculiarities that necessitate constant attention in a criminal trial; and the difficulty is, that they assume a varying importance in proportion to the magnitude and heinousness of the offense. However, to indicate all of these differences, is the very object of this book; and we refrain from further particularization in this introductory chapter.

§ 3. **The Term “Evidence” Defined.**—Evidence is the means employed for the purpose of proving an unknown or disputed fact, and is either judicial or extra-judicial. Judicial evidence is that which is used on trials or inquiries before courts, judges, commissioners, referees, etc., while extra-judicial evidence is that which is used to satisfy private persons as to facts requiring proof. Rapalje & Lawrence, Law Dict., title *Evidence*. Every determination of the judgment, whatever may be its subject, is the result of evidence.

Proof and evidence are constantly used in practice as synonymous, and are sometimes so treated in the books. Properly speaking, however, evidence is only the medium of proof; proof is the effect of evidence. Burrill, Law. Dict., title *Proof*.

The term “proof” is often confounded with that of “evidence,” and applied to denote the medium of proof, whereas in strictness it marks merely the effect of evidence. When the result of evidence is undoubting assent to the certainty of the event or propo-

sition which is the subject-matter of inquiry, such event or proposition is said to be proved; and, according to the nature of the evidence on which such conclusion is grounded, it is either known or believed to be true. Our judgments, then, are the consequence of proof; and proof is that quantity of appropriate evidence which produces assurance and certainty; evidence, therefore, differs from proof, as cause from effect. Wills, Circ. Ev. p. 2.

“The term ‘evidence’ is to be carefully distinguished from its synonyms, ‘proof’ and ‘testimony.’ ‘Proof’ is the logically sufficient reason for assenting to the truth of a proposition advanced. In its judicial sense it is a term of wide import, and comprehends everything that may be adduced at a trial, within the legal rules, for the purpose of producing conviction in the mind of judge or jury, aside from mere argument; that is, everything that has a probative force intrinsically, and not merely as a deduction from, or combination of, original probative facts. But ‘evidence’ is a narrower term, and includes only such kinds of proof as may be legally presented at a trial, by the act of the parties, and through the aid of such concrete facts as witnesses, records, or other documents. Thus, to urge a presumption of law in support of one’s case is adducing proof, but it is not offering evidence. ‘Testimony,’ again, is a still more restricted term. It properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or depositions. Thus, an ancient deed, when offered under proper circumstances, is evidence, but it could not strictly be called ‘testimony.’ ‘Belief’ is a subjective condition resulting from proof. It is a conviction of the truth of a proposition, existing in the mind, and induced by persuasion, proof, or argument addressed to the judgment.” Black, Law. Dict. title *Evidence*.

Evidence is “any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved is termed the ‘principal fact;’ the fact which tends to establish it, ‘the evidentiary fact.’” 1 Bentham, Jud. Ev. 17, 18. It is that which brings or contributes to bring the mind to a just conviction of the truth or falsity of the fact asserted or denied. 1 Livingston’s Works, (ed. 1873) 419.

The word signifies in its original sense, the state of being evident, *i. e.* plain, apparent or notorious. But by an almost peculiar

inflection of our language, it is applied to that which tends to render evident or to generate proof. Best, Ev. § 11. This is the sense in which it is commonly used in modern law books, and will be used throughout this work.

Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which men, similarly situated, are usually governed. *Daggers v. Van Dyck*, 37 N. J. Eq. 130.

§ 4. **Definitions from the Celebrated “Field Code.”**—After an extended survey of the entire field of definition and after a critical review of every treatise bearing upon the topic, the conviction remains that the celebrated “Field Code” of California contains by far the most satisfactory statement of what evidence is, in juridical contemplation, of any to be met with in the entire range of legal literature. In proof of this the text of §§ 1823–1839, inclusive, is herewith furnished. The rare aptitude of its distinguished author for condensed and perspicuous expression here receives a most vivid illustration.

§ 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

§ 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

§ 1825. The law of evidence is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;
4. For the exclusion of whatever is not legal;
5. For determining in certain cases the value and effect of evidence.

§ 1826. The law does not require demonstration ; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

§ 1827. There are four kinds of evidence :

1. The knowledge of the court ;
2. The testimony of witnesses ;
3. Writings ;
4. Other material objects presented to the senses.

§ 1828. There are several degrees of evidence :

1. Primary and secondary ;
2. Direct and indirect ;
3. *Prima facie*, partial, satisfactory, indispensable and conclusive.

§ 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

§ 1830. Secondary evidence is that which is inferior to primary. Thus a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

§ 1831. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example : if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

§ 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example : a witness proves an admission of the party of the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

§ 1833. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example : the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record.

§ 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received subject to be rejected as incompetent, unless connected with the

fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterward connected with the fact in dispute.

§ 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

§ 1836. Indispensable evidence is that without which a particular fact cannot be proved.

§ 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

§ 1838. Cumulative evidence is additional evidence of the same character to the same point.

§ 1839. Corroborative evidence is additional evidence of a different character, to the same point.

§ 5. **Differences in the Effect of Evidence.**—There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offense charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous conviction or acquittal have induced the courts of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent judge expressed it, “such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.” The expression “moral certainty” is here used in contradistinction to physical certainty, or certainty properly so called; for the physical possibility of the innocence of any accused person can never be excluded. Best, Ev. § 95.

§ 6. **Observations on the Rules of Evidence.**—The rules of evidence, as founded on reason and crystalized in the judgments of the courts, constitute the best means for discovering truth, and are an integral part of our legal system, essential alike for private and social security. Nevertheless, language of most dangerous

tendency in regard to them has occasionally fallen from learned judges, which implies that they may be modified, according to the enormity of the crime, or the weightiness of the consequences which attach to conviction. Lord Finch, afterwards *Lord Chancellor* Nottingham, on the trial of Lord Cornwallis, said, "The fouler the crime is, the clearer and plainer ought the proof to be." 7 St. Tr. 149; and see *Rex v. Crossley*, 26 St. Tr. 218. "The more flagrant the crime is," said *Mr. Baron* Legge, "the more clearly and satisfactorily you will expect that it will be made out to you." *Rex v. Blandy*, 18 St. Tr. 1186. *Mr. Justice* Holroyd is represented to have said that "the greater the crime, the stronger is the proof required for conviction." *Rex v. Hobson*, 1 Lewin, C. C. 261.

It may be proper here to premise that the rules of evidence in criminal cases are, in most respects, the same as in civil cases. The chief distinction which prevails will be found to originate in that caution which is always observed when life or liberty is in question, and in those benign presumptions with which the law meets every accusation involving moral turpitude. Barbour, *Crim. Law*, p. 351, and see *N. Y. Laws*, 1892, chap. 279, § 392.

An early English case which is still cited with approval affirms that, "there is no distinction as regards the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other; and what is rejected in the one ought to be rejected in the other. A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence." *Rex v. Watson*, 2 Stark. 116; *Lord Melville's Case*, 29 How. St. Tr. 763.

These positions are distinctly sustained by *Chief Justice* Russell, who holds, in his well known work on "Crimes," that there is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter, which affect life and liberty.

Mr. Bishop is found in entire accord with the preceding view. In section 1046 of his 'Criminal Procedure,' he very aptly observes: "The object of all evidence being the establishment of truth, the rules for its admission and effect must be, and are, the same in criminal causes as in civil. But this abstract doctrine, sometimes

thus broadly laid down by the courts, is practically, in a degree, modified by the fact that in criminal causes, the end whereof is disgrace and punishment, the law has its presumption of innocence, differing from any known in civil jurisprudence; its consequent special rules for overcoming this presumption; and some others which seem peculiar, because applicable only in issues which never arise in the other department."

§ 7. **What is Embraced in the Term "Crime."**—While we distinctly repudiate any intention of blending our subject with that of criminal law, we should arrive at some accurate definitions. If we are to produce evidence of a crime or of criminal intent, it is obviously of considerable importance to first establish what crime is; or, more accurately, what the criminal law embraces. Sir William Blackstone says:

"Crime is an act committed or omitted in violation of a public law either forbidding or commanding it." 4 Bl. Com. 5. It is a wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name or in the name of the people or the sovereign. *Re Bergin*, 31 Wis. 386. See 1 Bishop, *Crim. Law*, § 32.

The New York Penal Code contains by far the most comprehensive definition. According to sections 3, *et seq.*

"A crime is an act or omission forbidden by law, and punishable upon conviction by

"1. Death; or

"2. Imprisonment; or

"3. Fine; or

"4. Removal from office; or

"5. Disqualification to hold any office of trust, honor, or profit under the state; or

"6. Other penal discipline.

"A crime is either (1) a felony; or (2) a misdemeanor." New York Penal Code, § 4.

"A felony is a crime which is or may be punishable by either (1) death; or (2) imprisonment in a state prison." New York Penal Code, § 5.

"The intent of the legislature to elevate an act to the importance of a crime cannot be imputed by loose influences and doubtful implications, but must be made to appear with reasonable certainty. We may guess that the legislature intended to make-

all prohibited acts criminal offenses, but it is impossible to so affirm with any degree of certainty, and the fact that they did not so declare is indicative that they did not so intend." *People v. Hislop*, 77 N. Y. 335.

The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223.

§ 8. **What is Criminal Law?**—The definition of crime as here outlined must not be regarded as trenching upon that of criminal law, which has been defined as "that branch of jurisprudence which treats of crimes and offenses. From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which in certain cases authorize the infliction of penalties, the privation of liberty, and even the destruction of life, with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*" Bouvier, Law Dict., title *Criminal Law*.

"Crimes and offenses are classed under the head of public wrongs, and are distinguished from private wrongs in this: that private wrongs, or civil injuries are an infringement or deprivation of the civil rights which belong to individuals, considered merely as individuals; whilst public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social, aggregate capacity." 4 Bl. Com. 5.

Crime and misdemeanor are synonymous terms; though, in common usage, "crimes" denotes such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of "misdemeanors." 4 Bl. Com. 5; 3 Bl. Com. 2. In short, the term "crime" embraces any and every indictable offense. See *People v. New York Police Comrs.* 39 Hun, 510; *State v. Bishop*, 7 Conn. 185; *Alton v. Hope*, 68 Ill. 168; *Re Voorhees*, 32 N. J. L. 144; *Re Clark*, 9 Wend. 212; *O'Shea v. Twohig*, 9 Tex. 340; *Kentucky v. Dennison*, 65 U. S. 24 How. 102, 16 L. ed. 727; *Re Howard*, 26 Vt. 208; *State v. Peterson*, 41 Vt. 511; 2 N. Y. Rev. Stat. 70, § 22. Yet it is not synonymous with "felony." *Lehigh County v. Schock*, 113 Pa. 379.

High crimes and misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony. *State v. Knapp*, 6 Conn. 417; 1 Russell, Crimes, 61. The meaning of the phrase "high crimes and misdemeanors," underwent much discussion in the case of President Johnson, who was tried on articles of impeachment in 1868, but the result of the case was not such that any authoritative rule can be derived from it.

The criminal law has, therefore, this object in view: to secure to the public the benefits of a social compact, by preventing or punishing every breach and violation of those laws which have been established for the government and tranquility of the whole. Some of the leading principles of the American system of the criminal law are: First. That every man is presumed to be innocent till the contrary is shown, and, if there is a reasonable doubt of his guilt, he is entitled to the benefit of the doubt. Second. That no person can be brought to trial except in the regular mode prescribed. Third. That the accused is entitled to trial by an impartial jury of his peers. Fourth. That the question of the guilt of the accused is to be determined without reference to his general character. Fifth. That the accused cannot be required to criminate himself. Sixth. That the accused cannot twice be put in jeopardy for the same offense. Seventh. That the accused cannot be punished for an act which was not an offense at the time of its commission. Haines, Justices of the Peace, part 2, p. 845.

§ 9. Principals and Accessories.—In the codes and statutes generally the parties to crimes are classified as principals and accessories, and all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offence, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories.

CHAPTER II.

JUDICIAL NOTICE.

- § 10. *Present Attitude of Judicial Authority.*
- 11. *Judicial Notice Excludes the Necessity of Proof.*
- 12. *Late Statute Relating to the Subject.*

§ 1. **Present Attitude of Judicial Authority.**—The present attitude of judicial authority upon this important topic of the law of evidence is indicated in a sententious utterance of the New York Court of Appeals in an opinion by *Chief Judge* Hunt. It is an epitome of the legal sentiment of this country, and through its logical inferences and implications it can be made to embrace every rule pertinent to this discussion. After an interesting resumé of the authorities implicated with this question, he summarizes the conclusion in the following terms: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction, and where the memory of the judge is at fault, he may resort to such documents of reference as may be at hand and he may deem worthy of confidence." *Swinnerton v. Columbian Ins. Co.* 37 N. Y. 174, 93 Am. Dec. 560.

A court will notice, judicially, a thing in the common knowledge and use of the people throughout the country, as: the general customs and usages of merchants; the seals of notaries; things which must happen according to the laws of nature; the coincidence of the days of the week with those of the month; the meaning of the words in the vernacular language; the customary abbreviations of Christian names; the accession of the chief magistrate to office, his leaving it, and the appointment of members of his cabinet; the election and resignation of senators; the appointment of marshals and sheriffs, but not of their deputies; of the ports and waters where the tide ebbs and flows; of the boundaries of the states, and of judicial and collection districts. *Brown v. Piper*, 91 U. S. 42, 23 L. ed. 201.

Statutes prescribing the boundaries of the territory, and its division into judicial districts, are public acts, which the courts are bound to know, and of which they will take judicial notice.

The limits of such divisions are therefore of judicial cognizance; and so with regard to leading places and the geographical features of the land within such limits; as also with regard to the location and position of leading cities, villages, and public places therein. *United States v. Beebe*, 2 Dak. 292.

Besides those facts of which courts are bound by law to take judicial notice, they will ordinarily only take notice of facts of universal notoriety,—of facts that are so generally understood that they may be regarded as forming part of the common knowledge of every person. *Brown v. Piper*, 91 U. S. 41, 23 L. ed. 201; *Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444.

To aid the court, a document which is a proper source of general information for the purpose, may be handed up to the judge. Abbott, Trial Brief, § 494, citing *Case v. Perew*, 46 Hun, 57.

§ 2. Judicial Notice Excludes the Necessity of Proof.—“No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or document or book of reference for his satisfaction, in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling on him to take such notice produces any such document or book of reference.” Stephen, Dig. art. 59. See also *Kennedy v. Com.* 78 Ky. 447; *Rodgers v. State*, 50 Ala. 102; *Dorman v. State*, 56 Ind. 454; *Williams v. State*, 67 Ga. 260; *Briffitt v. State*, 58 Wis. 39; *Waller v. State*, 38 Ark. 656; *Gallagher v. State*, 10 Tex. App. 469; *State v. Johnson*, 26 Minn. 316; *United States v. Beebe*, 2 Dak. 292; *State v. Bowen*, 16 Kan. 475.

§ 3. Late Statutes Relating to the Subject.—The most extended survey of the adjudications relative to this subject of judicial notice has failed to disclose the presence of any more apt and concise expressions than those contained in sections 707–708 of the Statutory Law of Oregon. The recitals of those sections crystalize the entire tenor and trend of American adjudication on the subject; and the legitimate inferences to which the language used may be justly subjected, will demonstrate the rare force and precision of the terms employed. I append this entire text of these justly celebrated sections.

Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office, and the official signatures and seals of office, of the principal offices of government in the legislative, executive, and judicial departments of this state and of the United States.

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

This subject of judicial notice has been accorded extended treatment in 1 Rice, Civil Evidence, chap. 2. To avoid extended reduplication we refrain from further comment.

CHAPTER III.

PRESUMPTIONS.

- § 13. *The Term Defined.*
- 14. *Presumptions of Law.*
- 15. *Presumptions of Fact.*
- 16. *Presumptions of Innocence.*
- 17. *Presumptions of Legitimacy.*
- 18. *Presumptions of Death.*
 - a. *Raised by Continuous Absence of Seven Years.*
 - b. *No Presumption as to the Time of Death Arises from Mere Absence.*
 - c. *How Established.*
 - d. *Importance of this Presumption in Criminal Law.*
 - e. *Suicide.*
- 19. *Presumption of Sanity and Responsibility.*
- 20. *Presumption where Accused is under Seven Years of Age.*
- 21. *Continuance.*
- 22. *Presumption of Guilt Arising from Silence and Conduct Generally.*
- 23. *Presumption of Natural Consequences of Act.*
- 24. *Statutory Law of California on the Subject.*

§ 13. **The Term Defined.**—"A presumption arises, where, some facts being proved, another follows as a natural or very probable conclusion from them, so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted, until the contrary be proved by the opposite party; *stabiter praesumptioni donec probetur in contrarium*. And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the obvious facility of disproving it, or of proving facts inconsistent with it, if it really never occurred. It is, therefore, we have seen, adopted in proof of intent, of the willful doing of an act, of malice, and of guilty knowledge, for these can be proved only by the admission of the party, or from his overt acts, from which the jury may infer or presume them. It is adopted, also, in proof of the commission of the offense itself, in the absence of evidence of any person who

actually saw it committed, as shall be noticed presently." Archbold, Crim. Pr. & Pl. 134.

A presumption is a rule of law, that courts and judges shall draw from certain facts, certain inferences; it stands as a rule dispensing, in certain cases, with any ulterior inquiry. It assumes a certain condition of things to exist until the contrary is shown. *Schuyllkill & D. Imp. & R. Co. v. Munson*, 81 U. S. 14 Wall. 449, 20 L. ed. 872.

"A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment." *Ree v. Burdett*, 4 Barn. & Ald. 161.

It is a species of evidence which proceeds upon the theory that the jury can infer the existence of a fact from another fact that is proved, and which most usually accompanies it. *Home Ins. Co. v. Weide*, 78 U. S. 11 Wall. 440, 20 L. ed. 198. See also *Stanley v. State*, 26 Ala. 30; *Binns v. State*, 66 Ind. 432; *Chesley v. Brown*, 11 Me. 146; *Bow v. Allenstown*, 34 N. H. 365, 69 Am. Dec. 489; *Snediker v. Everingham*, 27 N. J. L. 150, 153; *Betts v. Jackson*, 6 Wend. 181; *Jackson v. Warford*, 7 Wend. 66; *McConnell's App.* 97 Pa. 34; *Oaks v. Weller*, 16 Vt. 71; *Welch v. Sackett*, 12 Wis. 257.

§ 14. Presumptions of Law.—With regard to presumptions of law there is not much difficulty, the circumstances under which they arise being generally pretty clearly defined. It is not so, however, with regard to presumptions of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several presumptions arising out of the same state of facts is the right one.

In civil cases it is always necessary for a jury to decide the question at issue between the parties, and, whatever be their decision, the rights of the parties will accordingly be affected; however much, therefore, they may be perplexed, they cannot escape from giving a verdict founded upon one view or the other of the conflicting facts before them; presumptions, therefore, are necessarily made on comparatively weak grounds. But in criminal cases there is always a result open to the jury, which is practically

looked upon as merely negative, namely, that which declares the accused to be not guilty of the crime with which he is charged. In cases of doubt it is to this view that juries are taught to lean. 1 Phil. Ev. (10th ed.) 456; M'Nally, Crim. Ev. 578. Great caution is, doubtless, necessary in all cases of presumptive evidence, and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods of a certain person unknown, merely because he could not give an account how he came by them, unless there was due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." 2 Hale, P. C. 290. So it is said by Sir William Blackstone, 4 Bl. Com. 359, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. See 1 Roscoe, Crim. Ev. 16.

Presumptions of law are, in reality, rules of law and part of the law itself; and the court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise, while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of a jury. Best, Presumptions, 18. The presumption of innocence, of sanity, that all men are free, etc., are examples of presumptions of law. So, too, a promise will be implied from a legal obligation. But the presumption of the existence of one fact from the existence of another, that is, the progress of ascertaining one fact from the proof of another fact, is within the exclusive province of the jury. 1 Greenl. Ev. § 48. The usual presumption as to a ship which becomes distressed, or founders without apparent cause shortly after leaving port, is that she was unseaworthy when she sailed; but the presumption is one of fact and for the jury, under instructions from the court, and subject to the power of the court to set aside the verdict if against evidence. Best, Presumptions, 50. Whether an agreement to pay interest is to be presumed from the established usage and custom is a question for the jury. *Meech v. Smith*, 7 Wend. 315. When there is a dispute as to the facts which go to prove the making of a new promise, whether a sufficient promise has been made to take the case out of the

statute of limitations, is a mixed question of law and fact for the jury. *Clarke v. Dutcher*, 9 Cow. 674.

Presumptive evidence and the presumptions or proofs to which it gives rise are not indebted for their probative force to any rules of positive law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such inferences are presumptions of fact. Best, Presumptions, 15, § 14; *Morgan v. Ravey*, 6 Hurlst. & N. 265.

Presumptions are of two classes, natural and legal or artificial. The natural presumption is, when a fact is proved, wherefrom by reason of the connection founded on experience, the existence of another fact is directly inferred. The legal or artificial presumption is, where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other. Forbearance to enforce a pecuniary demand for twenty years, is not direct evidence that the money has been paid, but on the fact of forbearance, the law builds a presumption that the demand has been satisfied, since it wisely supposes a man will sooner recover and enjoy what belongs, or is due to him, unless prevented by some impediment. The law gives to the evidence a technical efficacy beyond its simple and natural force and operation. Inasmuch then as this is but a presumptive bar, the fact which the lapse of time conduces to prove must be pleaded, and not the mere lapse itself. *Gulick v. Loder*, 13 N. J. L. 68.

§ 15. **Presumptions of Fact.**—Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. I am aware that many of the elementary writers have said that presumption may be looked upon as bold inferences pushed further than the facts established will strictly warrant. *Gresley*, Equity Ev. 372.

These extreme cases of forced and extravagant presumptions are very justly dealt with by Sir W. D. Evans (see appeal to Pothier, 331) where he says: "The principle adopted in *Wilkinson v. Payne*, 4 T. R. 468, is certainly very dangerous in its tendency, as it goes to subvert the main foundations of the distinction between truth and falsehood. He adds, many cases must

occur in the administration of justice, when the wishes of those who are to decide must, from the nature of the circumstances, be in opposition to the legal right, but if we once began to shake the rule, that the law is to command and the judges to obey; if we once admit the propriety of professing to believe as true, what we are actually convinced is not so, nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion." These views are quoted with approbation by Gresley, at page 374. Mr. Starkie, in speaking of this case of *Wilkinson v. Payne* and *Standen v. Standen*, 6 T. R. 331 *n.* (cited in 4 T. R. 469) says it may be very questionable, whether such decisions are not only contrary to sound policy, but even positively mischievous. He adds, do they not afford temptation to juries in hard cases, to trifle with the sacred obligation of an oath? 2 Starkie, Ev. 686, *note f.*

Still another definition is to the effect that "a presumption of fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. The principle is recognized in criminal jurisprudence that proof of certain facts may lead irresistably to the presumption that another act, of which there is no direct proof, was committed or done. Men are presumed to act according to their own interests. It is presumed that regular and ordinary means are adopted for a given end. So where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, a particular completion will be presumed." 1 Phil. Ev.* 599-610; *Roberts v. People*, 9 Colo. 458.

"Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases." Presumptions of fact are derived from circumstances of the particular case, by means of the common experience of mankind. *Kent v. People*, 8 Colo. 563; Bouvier, Law Dict. title *Presumption*.

§ 16. **Presumptions of Innocence.**—The first presumption of criminal law—one of extended application and wide recognition, is that which presumes the innocence of the accused, and insists upon such evidence to the contrary as will establish guilt beyond a reasonable doubt. *People v. Thayer*, 1 Park. Crim. Rep. 595.

A defendant has this presumption of innocence with him through the whole case. The advantage he derives, however, from the fact that the burden is on the prosecution to make out the points it advances, is only temporary. As soon as this is done to such an effect as to sustain a verdict of guilty, then, should the proof close at that point, the case goes to the jury free from any presumptions arising from the prior imposition of this burden. Whart. Crim. Ev. § 322; *Nevling v. Com.* 98 Pa. 322; *People v. Cheong Foon Ark*, 61 Cal. 527; *Jones v. State*, 13 Tex. App. 1; *Case v. People*, 76 N. Y. 242.

While it is true that the recent possession of stolen property, unexplained, raises a presumption that the person in possession stole it; but this is only a rule of evidence, and the presumption may be overcome by the proof showing that the possession is not inconsistent with an honest intention. *Housh v. People*, 75 Ill. 487. Here we have an apt illustration of the extreme tenderness of the criminal law for persons accused of crime. And this presumption of innocence accompanies the suspect in all stages of the trial. A familiar passage will serve to emphasize this truth.

“In the investigation and estimate of criminatory evidence there is an antecedent *prima facie* presumption in favor of the innocence of the party accused, grounded in reason and justice, and recognized in the judicial practice of all civilized nations; which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief. It must be admitted that in the aggregate, the number of convictions vastly exceeds that of acquittals, and that the probability is that, in a given number of cases, far the greater number of the parties accused are guilty; but according to all judicial statistics, and under every system, a considerable proportion of the persons put upon trial are legally innocent. In any particular case, therefore, the party may not be guilty, and it is impossible, without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is, therefore, a settled and inviolable principle, that anterior to contrary proof, the accused shall be considered as legally innocent, and that his case shall receive the same dispassionate and impartial consideration as if he were really so.” Wills, Circ. Ev. 147.

The law in its partiality to the presumption of innocence, will

insist that where conflicting presumptions supervene the stronger of the two must prevail; and that the presumption of innocence must be deemed superior.

This does not compromise the well known rule, which allows a presumption to be rebutted by a contrary presumption, which latter is more conclusive in its character.

Mr. Lawson in his well known work on "Presumptive Evidence," enters upon an able discussion of this subject, and defends his views with logic and ingenuity. He says at p. 458: "The presumption of sanity and the presumption of innocence coming in conflict, the latter must give way according to the best considered doctrine on this question. The subject is an important one, and has led to much discussion. The decisions are not harmonious, and no question is more debated at the present time, when it arises for actual decision, than the question of the burden of proof of insanity in criminal cases."

The absence of a motive for the commission of a crime, proved for the purpose of strengthening the presumption of innocence; and conversely, the presence of a motive may be shown to strengthen the hypothesis of guilt. This is well recognized logic under all systems of criminal jurisprudence.

In *Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662, it was held that while the law presumes every one innocent, it does not presume anyone to have a good character, and *a fortiori* it will not presume chastity in a prosecutrix for rape.

So a witness is presumed to speak the truth. But this presumption may be repelled by the manner in which he testifies, by his interest in the controversy, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence.

§ 17. Presumptions of Legitimacy.—Upon this subject Mr. Stephen very aptly observes: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the

physical condition of the husband, or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred. Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other, nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother, or her husband can be called as a witness or not, provided that in applications for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten." Stephen, Dig. art. 98.

§ 18. **Presumptions of Death.**—A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death, but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it. There is no presumption as to the age at which a person died who is shown to have been alive at a given time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck or battle. Stephen, Dig. art. 99.

a. **Raised by Continuous Absence for Seven Years.**—The protracted absence of a person from his home and friends for a period of seven years, during which time he is not heard from, raises the presumption of death. *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Rice v. Lumley*, 10 Ohio St. 596; *Holmes v. Johnson*, 42 Pa. 159; *Primm v. Stewart*, 7 Tex. 183; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086; *Adams v. Jones*, 39 Ga. 508; *Proctor v. M'Call*, 2 Bail. L. 298, 23 Am. Dec. 135; *Lajoie v. Primm*, 3 Mo. 529; *Hoyt v. Newbold*, 45 N. J. L. 219, 46 Am. Rep. 767; *Stevens v. McNamara*, 36 Me. 176, 58 Am. Dec. 740; *Doe v. Flanagan*, 1 Ga. 538; *Spears v. Burton*, 31 Miss. 554; *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300; *Godfrey v. Schmidt*, 1 Cheves, Eq. 57; *Moffit v. Varden*, 5 Cranch, C. C. 658; *Crawford v. Elliott*, 1 Houst (Del.) 465; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 196; *King v.*

Paddock, 18 Johns. 141; *Bradley v. Bradley*, 4 Whart. 173; *Loring v. Steineman*, 1 Met. 210.

b. No Presumption as to the Time of Death Arises from Mere Absence.—Although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if anyone has to establish the precise period during those seven years at which such person died, he must do so by evidence and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the continuance of life. These views are in harmony with the settled laws of the English courts, as will be seen from an examination of the authorities. *Hopewell v. De-Pinna*, 2 Campb. 113; *Reg. v. Lumley*, L. R. 1 C. C. 196; *Dunn v. Snowden*, 32 L. J. Ch. 104; *Lambe v. Orton*, 29 L. J. Ch. 286; including the leading case in the court of exchequer of *Nepean v. Knight*, 2 Mees. & W. 894, in error from the Court of King's Bench. In that case Lord Denman, *Ch. J.*, said: "We adopt the doctrine of the Court of King's Bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." To the same effect is the preponderance of authority in this country. *McCartee v. Camel*, 1 Barb. Ch. 456, 5 L. ed. 453; *Lancaster v. Washington L. Ins. Co. of New York City*, 62 Mo. 121; *Stouwenel v. Stephens*, 2 Daly, 319; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Stevens v. McNamara*, 36 Me. 176; *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Smith v. Knowlton*, 11 N. H. 191; *Flynn v. Coffee*, 12 Allen, 133; *Loring v. Steineman*, 1 Met. 204; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Doe v. Flanagan*, 1 Ga. 538; *Smith v. Smith*, 49 Ala. 156; *Gibbes v. Vincent*, 11 Rich. L. 323.

For an exhaustive review of the authorities sustaining this presumption, see the opinion of *Mr. Justice Harlan* in *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. See also *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Youngs v. Heffner*, 36 Ohio St. 232; *Adams v. Jones*, 39 Ga. 479; *Wentworth v. Wentworth*, 71 Me. 72; *Smith v. Smith*, 49 Ala. 156.

c. How Established.—Any evidence calculated to negative the presumption of life is competent to establish the presumption of death. *Anderson v. Parker*, 6 Cal. 197; *Ruloff v. People*, 18 N. Y. 179; *Crouch v. Eveleth*, 15 Mass. 305; *Hancock Mut. L.*

Ins. Co. v. Moore, 34 Mich. 41; *Bailey v. Bailey*, 25 Mich. 185; *Scheel v. Eidman*, 77 Ill. 304; *Jackson v. Etz*, 5 Cow. 319.

d. Importance of this Presumption in Criminal Law.—

The presumption of life or death is one of great importance in criminal law. For an elaborate discussion of the principles underlying this presumption, see the opinion of Johnson, *Ch. J.*, in *Ruloff v. People*, 18 N. Y. 179.

Mr. Wills, in his treatise on Circumstantial Evidence, says: "Death may be inferred from such strong and unequivocal circumstances that render it morally certain and leave no ground for doubt." p. 208.

e. Suicide.—In the case of *Persons v. State*, 90 Tenn. 291, the court below charged the jury in the manner following: "All things being equal you are to presume that a party found dead did not die by his own hands. In all cases of sudden death the presumption of the love of life negatives the idea of suicide. It is true, however, that this presumption of death other than by suicide, yields at once to any inference that may be logically inferred from the facts of the case."

On appeal, the supreme court, speaking through Turney, *Ch. J.*, held this to constitute reversible error in that it left the jury to conclude that if the proof preponderated against the contention for suicide, or was evenly balanced, then it was, by a rule of law, required to find against the insistence of the defense; that the defendant was not entitled to the benefit of a reasonable doubt, but must make out to the satisfaction of the jury that the deceased took his own life. It placed the defendant in the relation of prosecutor to make clear a case of suicide before he could insist upon such facts as conducing to prove an hypothesis inconsistent with his own guilt.

When the defendant has shown conduct, declarations, and circumstances pointing to a suicidal intent, then it devolves upon the state to show satisfactorily and beyond a reasonable doubt it was not suicide, before the defendant can be deprived of the benefit of such reasonable doubt as his facts would create. The charge of the judge reversed the rule, and put the burden of full proof on the defendant. *Persons v. State*, 90 Tenn. 291.

In civil cases, where one has been found dead, even with marks of violence, nothing else appearing, the presumption is that the deceased did not commit suicide, as also that he or she was not

murdered. *Accident Ins. Co. of N. A. v. Bennett*, 90 Tenn. 236. Further it appears that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes, by accident, nor by the deceased himself. 1 Starkie, Ev. 575.

While it is unquestionably true that the rules of evidence are the same in civil and criminal cases, it does not follow that because the rule is the same that presumptions applicable in one are always applicable in the other. An antagonistic presumption may exist, and does in criminal cases—that is, the innocence of the defendant. So the presumption that a deceased did not commit suicide cannot be applied in criminal cases against the presumption of innocence. *Persons v. State*, 90 Tenn. 291.

§ 19. **Presumption of Sanity and Responsibility.**—Should the question of insanity become one of any importance in a criminal proceeding, reliance may be had upon the postulate of law which attributes to all persons the possession of their faculties. Where the contrary is alleged it must be proved. *Lilly v. Waggoner*, 27 Ill. 395; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Stubbs v. Houston*, 33 Ala. 555; *Thornton v. Appleton*, 29 Me. 300; *United States v. McGlue*, 1 Curt. C. C. 1; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *State v. Smith*, 53 Mo. 267; *Porter v. Campbell*, 2 Baxt. 81; *Saxon v. Whitaker*, 30 Ala. 237; *Den v. Vancleve*, 4 Wash. C. C. 262; *Jackson v. Van Dusen*, 5 Johns. 158, 4 Am. Dec. 330; *Jackson v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Egbert v. Egbert*, 78 Pa. 328; *Anderson v. Cranmer*, 11 W. Va. 562; *Weed v. Mutual Benefit L. Ins. Co.* 70 N. Y. 561; *Brown v. Torrey*, 24 Barb. 583; *Walter v. People*, 32 N. Y. 147; *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340. In *Weed v. Mutual Benefit L. Ins. Co.* it was said: "The sanity of every individual is presumed, and insanity cannot be presumed from the mere fact of suicide."

Sanity is a normal condition, and the criminal law harbors the presumption that all men are in possession of their faculties to the extent of intending or contemplating the natural results of the act they commit. It follows, that where the prosecution has proved the commission of an offense, the legal presumption as to

sanity may be invoked as supplemental to this proof, and the state has made out a prima facie case sufficient, without rebutting testimony, to sustain the conviction.

Upon this showing, where the defendant seeks to avoid the consequences of his offense through the plea of insanity, the burden of proof in a certain sense shifts, and it devolves upon him to show that the presumption of insanity is to be ignored. It should be added that the presumption of innocence clings to the accused throughout the entire trial. *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Alexander v. People*, 96 Ill. 96; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24; *State v. Jones*, 64 Iowa, 349; *State v. Crawford*, 11 Kan. 32; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 269, 21 Am. Rep. 360; *Wright v. People*, 4 Neb. 407; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Waterman*, 1 Nev. 543; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Dove v. State*, 3 Heisk. 348; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. There is considerable contradiction upon this subject, and the practitioner must observe the *lex fori* in all cases.

When the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a "reasonable doubt," there a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury ought to say, that the evidence of his insanity was clear. The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty. *State v. Spencer*, 21 N. J. L. 196.

§ 20. **Presumption where Accused is Under Seven Years of Age.**—A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness. Whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court or jury to determine the age thereby; and the court or

magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age. A copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register, or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health, duly authenticated by its secretary or under its seal, and the entries made in a family Bible, shall also be competent evidence upon the question of the age. N. Y. Penal Code, § 19.

An infant is capable of testifying to his own age. *Cheever v. Congdon*, 34 Mich. 296; *Morrison v. Emsley*, 53 Mich. 564; *Central R. Co. v. Coggin*, 73 Ga. 689.

The court may rely upon its own judgment as to the prisoner's age, or the jury may determine it by general inspection or by any evidence in the case. *People v. New York County Justices*, 10 Hun, 224; *Com. v. Emmons*, 98 Mass. 6. Evidence may be received from any person capable of giving it for the purpose of proving the fact, or where the appearance of the prisoner sufficiently indicates his proper age, that may be acted upon as evidence of the fact. *State v. Arnold*, 35 N. C. 184; *contra*, *Ihinger v. State*, 53 Ind. 251.

§ 21. **Continuance.**—Another presumption of law and one that is believed without qualification is this: Where a condition or state regarding persons or things is shown to exist, that condition or state is presumed to continue until the contrary is shown. *Kidder v. Stevens*, 60 Cal. 415; *Mullen v. Pryor*, 12 Mo. 307; *Eames v. Eames*, 41 N. H. 177; *Garner v. Green*, 8 Ala. 96; *Hood v. Hood*, 2 Grant, Cas. 229; *Gould v. Norfolk Lead Co.* 9 Cush. 338, 57 Am. Dec. 50; *Montgomery & W. Plank Road Co. v. Webb*, 27 Ala. 618.

In criminal law as in civil cases, a fact continuous in its character and nature is presumed to continue. *Wilkins v. Earle*, 44 N. Y. 172, 3 Am. Rep. 655; *Poe v. Dorrah*, 20 Ala. 289, 56 Am. Dec. 196; *Magee v. Scott*, 9 Cush. 148, 55 Am. Dec. 49; *Smith v. New York Cent. R. Co.* 43 Barb. 225; *Eames v. Eames*, *supra*; *Graves v. State*, 12 Wis. 593; *Laughlin v. Chicago & N. W. R. Co.* 28 Wis. 204, 9 Am. Rep. 493; *Farr v. Payne*, 40 Vt. 615. It must be remembered that all presump-

tions of every name and nature are accorded legal indulgence merely to supply the place of facts that are supposed to exist, but they are utterly impotent, and worthless as against an established fact. *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 982; *Lincoln v. French*, 105 U. S. 614, 26 L. ed. 1189; Best, Presumptions, § 136; *Smith v. New York Cent. R. Co.* 43 Barb. 225.

It is only when insanity of a chronic or permanent nature is proved that its continuous existence is presumed. No such presumption arises where fitful and exceptional attacks of insanity are proved; and where an insane person has lucid intervals, an offense by him is presumed to have been committed during a lucid interval, unless the contrary appears.

An ordinary witness may testify to the sanity or insanity of a person with whom he is intimately acquainted. If expressing the opinion that such person is of unsound mind, he should state the facts on which such opinion is founded; but when he testifies that such person is sane, this is not necessary, since a sane person would not manifest any such eccentricities as usually mark the conduct of person of unsound mind. *Ford v. State*, 71 Ala. 385.

§ 22. **Presumption of Guilt Arising from Silence and Conduct Generally.**—In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party at the time of, or after being charged with, the offense. Thus it is frequently proved that upon being charged he fled, or endeavored to make his escape. Upon this proof it is said by Smith, *B.*, that he had the authority of the law to say, that though a man charged with an offense should fly, that is not conclusive evidence of guilt. The jury could not forget that one of the oaths they had taken was, whether the prisoner had fled in consequence of the charge made on him; but though it should be established that he fled in consequence of the charge, yet it did not follow of necessity that he was guilty of the murder; though it was a circumstance materially unfavorable and suspicious. *Crawley's Case*, cited in *M'Nally*, Crim. Ev. 577. The introduction of a falsehood into the defense is also a presumption against a prisoner. This presumption is heightened if the falsehood is to be supported, as it almost necessarily must be, by a witness conscious of it. *Clarke's Case*, 1789, cited in *Gilbert*, Ev. (Loft. ed.) 898; *M'Nally*, Ev. 580. No presumption of guilt arises from the

silence of a prisoner when, on his examination before a magistrate, he is charged by another prisoner with having been joined in the commission of the offense. *Rev v. Appleby*, 3 Starkie, 33.

In weighing the effect of the presumptive evidence furnished by the conduct of a person charged with the criminal offense, great caution should be exercised. An innocent man finding himself in a situation of difficulty, and perhaps from the circumstances of the case, of danger, is sometimes induced to adopt a line of conduct which bears with it a presumption of guilt. 2 Hale, P. C. 290*n*.

"Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place. The legal presumption from flight is against the prisoner, and it lies upon him to rebut it." Fox, *J., Chapman's Trial* (Pamphl.) p. 213; *Fanning v. State*, 14 Mo. 386.

So the destruction, suppression, withholding or fabrication of evidence by a party, creates the presumption that the truth is detrimental to his interests. *Winchell v. Edwards*, 57 Ill. 41. And reasoning from analogy we have the further proposition that where a defendant adopts a theory of defense which is false, and which he must have known to be false, it is not error for the court to instruct the jury, that if the attempted explanation fails it may be regarded as indicative of his guilt. *Pilger v. Com.* 112 Pa. 220. And "a failure to produce proof, when in the power of the party, is recognized, even in criminal cases, as proper to be considered by the jury." *State v. Ward*, 61 Vt. 153.

The rule which imposes upon a suspect the obligation of producing evidence, which will contradict or explain circumstantial evidence against him, requires him to do so only when he is pressed by circumstantial proof, having it in his power to destroy its apparent force. 1 Cowen & Hill's Notes, 310, and cases there cited; 1 Starkie, Ev. 34; 3 Starkie, Ev. 487. Before the absence of evidence can affect the accused, it must appear that there is evidence that would elucidate the matter in dispute, and that it is peculiarly within the knowledge of the accused; and then if he is pressed by the force of circumstantial evidence and does not produce the evidence within his power, it may afford a strong presumption against him. *People v. McWhorter*, 4 Barb. 438.

Of similar import is the language of Judge Barnard, who in writing for affirmance in a criminal case decided 30 years later,

employs the following language: "When a man has evidence at hand, by which he could prove a given fact material to his defense, and does not use it, it was for the jury to say whether it should be considered against him or not." And generally we may affirm, that where the guilt of the accused depends upon the credibility of evidence given by an accomplice, it is no error to charge the jury that they might take into consideration the omission of the prisoner to contradict the accomplice upon a statement in respect to which, if false, contradictory evidence was apparently within the prisoner's power. *People v. Dyle*, 21 N. Y. 578.

The silence of a defendant when he should have spoken cannot be taken to be an admission unless it is proved that he heard the statement which he should have denied. *People v. Holfelder*, 5 N. Y. Crim. Rep. 179. And this rule is of doubtful propriety in any event obviously if the silence of a witness can be treated as evidence against a party who cannot compel him to answer, it would not be difficult to make out a case against anyone on mere insinuations. It is the duty of the court to caution the jury against this. *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477.

§ 23. **Presumption of Natural Consequences of Act.**—In Starkie on Evidence it is said, "that a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence" (p. 848). "There is a general presumption in criminal matters that a person intends whatever is the natural and probable consequences of his own actions." 1 Phil. Ev. 632. It was said by Judge Andrews, that, "it is a fundamental rule of evidence of very general application, founded upon observation and experience, that a man is presumed to intend the natural consequences of his act." *People v. Conroy*, 97 N. Y. 62.

It follows from this presumption, that a criminal intent is presumed from the commission of a criminal act. N. Y. Penal Code, § 17.

§ 24. **Statutory Law of California on the Subject.**—Three sections of the California Code of Civil Procedure embody the most exhaustive resumé of authority, and reflect so faithfully the present attitude of the law regarding this somewhat extended topic, that a failure to reproduce the salient features they embody would argue gross neglect of the subject. As a monumental ex-

hibit of condensation they will attract attention, and as an epigrammatic statement of statutory law they are of ideal excellence and singularly pertinent in their relations to the law of criminal evidence throughout the Federal union.

The following extract is from part 4, California Code of Civil Procedure, title "Evidence—Inferences and Presumptions," chap. 5.

When Presumptions may be controverted—§ 1961. "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumptions."

What Presumptions are conclusive.—§ 1962. "The following presumptions and no others are deemed conclusive:

"1. A malicious and guilty intent, from the deliberate commission of a unlawful act, for the purpose of injuring another;

"2. The truth of the facts recited, from a recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

"3. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it;

"4. A tenant is not permitted to deny the title of his landlord, at the time of the commencement of the relation;

"5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;

"6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

"7. Any other presumption which by statute is expressly made conclusive."

What presumptions may be controverted; extended tabulation of these instances.—§ 1963. "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

- "1. That a person is innocent of crime or wrong;
- "2. That an unlawful act was done with an unlawful intent;
- "3. That a person intends the ordinary consequences of his voluntary act;
- "4. That a person takes ordinary care of his own concern;
- "5. That evidence willfully suppressed would be adverse if produced;
- "6. That higher evidence would be adverse from inferior, being produced;
- "7. That money paid by one to another was due the latter;
- "8. That a thing delivered by one to another was due the latter.
- "9. That an obligation delivered up to the debtor has been paid;
- "10. That former rent or installments have been paid when a receipt for the latter is produced;
- "11. That things which a person possesses are owned by him;
- "12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;
- "13. That a person is possessed of any order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;
- "14. That a person acting in a public office was regularly appointed to it;
- "15. That official duty has been regularly performed;
- "16. That a court or judge, acting as such, whether in this state or in any other state or country, was acting in the lawful exercise of his lawful jurisdiction;
- "17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;
- "18. That all matters within an issue are laid before the jury and passed upon by them, and, in like manner, that all matters within a submission to arbitration were laid before the arbitrator and passed upon by him;
- "19. That private transactions have been fair and regular;
- "20. That the ordinary course of business has been followed;
- "21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration;
- "22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

"23. That a writing is truly dated;

"24. That a letter duly directed and mailed was received in the regular course of the mail;

"25. Identity of person from identity of name;

"26. That a person not heard from in seven years is dead;

"27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

"28. That things have happened according to the ordinary course of nature and the ordinary habits of life;

"29. That persons acting as copartners have entered into a contract of copartnership;

"30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

"31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

"32. That a thing once proved to exist continues as long as is usual with things of that nature;

"33. That the law has been obeyed;

"34. That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained;

"35. That a printed and published book purporting to be printed or published by the public authority was so printed or published;

"36. That a printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases;

"37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

"38. The uninterrupted use by the public of land for a burial ground for five years, with the consent of the owner, and without a reservation of his right, is presumptive evidence of his intention to dedicate it to the public for that purpose;

"39. That there was a good and sufficient consideration for a written contract;

"40. When two persons perish in the same calamity, such as a

wreck, a battle or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, sex, according to the following rules:

"41. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;

"42. If both were above the age of sixty, the younger is presumed to have survived;

"43. If one be under fifteen, and the other above sixty, the former is presumed to have survived;

"44. If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;

"45. If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived."

For an elaborate consideration of this topic, see 1 Rice, Civil Evidence, chap. 3.

CHAPTER IV.

PRIMA FACIE EVIDENCE.

§ 25. *Term Defined.*

26. *Case Made by.*

27. *Legislature may Declare the Effect of.*

§ 25. **Term Defined.**—Prima facie evidence is such evidence as in judgment of the law is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose (*Kelly v. Jackson*, 31 U. S. 6 Pet. 632, 8 L. ed. 526; *Lilienthal's Tobacco v. United States*, 97 U. S. 268, 24 L. ed. 905); evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced (*Emmons v. Westfield Bank*, 97 Mass. 243); that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. Cal. Code, Civ. Proc. § 1833; *Swamp Land Dist. v. Gwynn*, 70 Cal. 570. See Anderson, Law Dict. title *Prima Facie Evidence*.

Prima facie evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted, or the contrary proved. Conclusive evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. 1 Starkie, Ev. 479.

As defined by the United States Supreme Court, prima facie evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact, and remain sufficient for that purpose if not rebutted. The jury are bound to consider it in that light, and the court will set aside their verdict and grant a new trial if without any rebutting evidence they disregard it. In a legal sense, such prima facie evidence, in the absence of all controlling evidence, of discrediting circumstances, becomes conclusive; that is, it should operate in the minds of the jury as decisive to found their verdict as to the fact. *Crane v. Morris*,

31 U. S. 6 Pet. 598, 8 L. ed. 514; *United States v. Wiggins*, 39 U. S. 14 Pet. 334, 10 L. ed. 481.

Mr. Justice Story's definition is scarcely less logical and satisfactory. He says: "It is such that in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict, and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregarded it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such was understood to be the clear principles of law on the subject." *Kelly v. Jackson*, 31 U. S. 6 Pet. 622, 8 L. ed. 523.

A consideration for this topic becomes necessary when the principles that characterize the affirmative of the issue are recalled. A party litigant, upon whom is cast the *onus probandi*, in order to comply with certain well recognized principles of law, introduces in support of the averment of his declaration certain evidence. Thus, in an action to determine the liability on a promissory note, the plaintiff usually declares and incorporates in affirmation of his claim statements to the effect that the defendant made, executed and delivered the note in suit; that the complainant became, in the due course of business, the holder and owner thereof for value, before maturity; that the same is due and unpaid; and that payment has been demanded and refused. This constitutes a *prima facie* case, on producing the note, which is usually then offered in evidence, and the plaintiff rests. The burden of proof is then shifted.

This mercurial nature of the burden of proof, and many illustrations of the peculiar province *prima facie* evidence sustains in the actual trial of a case are afforded by a close examination of that topic. It would involve a technical inaccuracy, perhaps, but would thoroughly accord with the actual facts, as seen and developed in our trial court, were I to postulate for *prima facie*

evidence this characteristic, viz: "Whenever the burden of proof devolves upon any party other than the one originally holding the affirmative, then and in that event, prima facie evidence has been established, and if no other evidence were offered, each party would be entitled to judgment."

Mr. Best is singularly infelicitous in his attempt at a definition. He says: "Strong presumptions of fact shift the burden of proof, even though the evidence to rebut them involve the proof of a negative. The evidentiary fact giving rise to such a presumption is said to be 'prima facie evidence' or the principal fact of which it is evidentiary. Thus, possession is prima facie evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them." Best, Ev. § 321, citing Gilbert, Ev. (4th ed.) 157.

§ 26. **Case Made by.**—The party upon whom the *onus probandi* rests, can make out a prima facie case, and close the evidence. The defense is not required to offer any evidence until the prosecution has made out a case sufficient to support a verdict; and when the prosecution has closed, the defendant is entitled to an acquittal if the case of the prosecution is not made out beyond a reasonable doubt. If the prisoner thinks it necessary to offer proof independent of what has appeared from the prosecution, he does not necessarily assume the burden of proof; it is simply offering rebutting testimony, which may be sufficient or not. The defendant all the time has the presumption of innocence, which is a substantial rule, operating during the whole trial, and continuing to operate until the case is finally determined. But because the defendant considers it necessary to rebut, is no reason why the law should raise a presumption of guilt, and thereby destroy the presumption of innocence, by evidence amounting to proof of innocence. Malone, Criminal Briefs, p. 250; *Wharton v. State*, 73 Ala. 366; *Guffu v. State*, 8 Tex. App. 187; *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329; *Jones v. State*, 13 Tex. App. 1; *Williams v. People*, 101 Ill. 382; *State v. Payne*, 86 N. C. 609.

It is the province of the judge to determine whether there is testimony sufficient to make it appear, prima facie, that a crime has been committed. The evidence on which the judge acts may

not necessarily establish the *corpus delicti*. It may be, and often is, conflicting and contradictory. In such case, the credibility of the witnesses, and the sufficiency of the entire evidence, are for the ultimate decision of the jury.

§ 27. **Legislature may Declare the Effect of.**—While the legislature may establish the effect of certain evidence and shift the burden of proof from one party to another, and declare what may be presumptive evidence of certain facts, it has not the power to make the lawful act of one person presumptive evidence of the unlawful act of another without any proof of his knowledge, complicity or consent. See New York Const. art. 1, § 6.

It has been repeatedly decided in New York, that the legislature has the right to declare what shall be presumptive evidence of any fact. *Hand v. Ballou*, 12 N. Y. 543; *People v. Mitchell*, 45 Barb. 212; *Hickox v. Tallman*, 38 Barb. 608; *Donahue v. O'Connor*, 13 Jones & S. 297; *Howard v. Moot*, 64 N. Y. 262, 5 Thomp. & C. 93.

Legislation of the character in question, as to rules of evidence is not without precedent, nor is its validity a question unadjudicated. In *Com. v. Williams*, 6 Gray, 1, Williams was indicted and convicted for being a common seller of spirituous and intoxicating liquors. The statute concerning the manufacture and sale of spirituous and intoxicating liquors, under which the indictment was found, provided, among other things, that "delivery in or from any store, shop, warehouse, steamboat or other vessel, or any vehicle of any kind, or any building or place other than a dwelling house, shall be deemed prima facie evidence of a sale."

The trial judge instructed the jury that the delivery by the defendant of such liquors in his place of business, the same not being a dwelling house, without evidence of payment therefor, was prima facie evidence of sale by the defendant, unless explained or controlled by other evidence. It was contended, upon appeal by the supreme court, that the provision was unconstitutional, because it was unreasonable, contrary to the rules and principles of the common law, an encroachment upon the judicial department, and subversive to the right of trial by jury.

The court held the statute to be constitutional, and the view taken of it is that it only prescribes, to a certain extent and under particular circumstances, what legal effect shall be given to a particular species of evidence, if it stands entirely alone and is left

wholly unexplained, that this evidence neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried; that the purpose and effect of the clause of the statute are to simply give a certain degree of artificial force to a designated fact until such explanations are afforded as to show that it is at least doubtful whether this proposed statutory effect ought to be attributed to it, but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors, and if this proof is furnished, and the delivery of any quantity of spirituous liquor, in a place other than a dwelling house, is fully shown, this will not be conclusive against the party charged with having made the sale of it; that making out a prima facie case does not change the burden of proof but is only the result of that amount of evidence which is sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if the fact so established be not encountered and controlled by other evidence tending to modify its effect, or to so explain it as to render the statutory inference from it too uncertain and improbable to be relied upon; the burden remains continuously on the government to establish the accusation charged in the indictment or information. *Com. v. Kimball*, 24 Pick. 373, 35 Am. Dec. 326; *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410.

In *Com. v. Wallace*, 7 Gray, 222, where the indictment was for an unlawful sale of spirituous and intoxicating liquors, it was again contended that the provision in question was unconstitutional, and applied only where a naked delivery was proved without any accompanying circumstances; and the trial judge was requested, *inter alia*, to so charge; but he refused, and instructed the jury that, if there was proved beyond a reasonable doubt a delivery of intoxicating liquor by the defendant from any building or place other than a private dwelling house or its dependencies, it would be prima facie evidence of a sale, and would warrant a conviction, but that the circumstances under which the delivery was made might rebut the presumption, or the presumption might be rebutted by proof. The supreme court overruled the exceptions taken to the instructions given. *Com. v. Rowe*, 14 Gray, 47, maintains the same doctrine, and that the burden is on the government to prove the sale beyond a reasonable doubt. See also *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381.

A statute of Maine provided that whenever an unlawful sale of intoxicating liquor is alleged, and delivery proved, it shall not be necessary to prove a payment, but such delivery shall be "sufficient evidence of sale." This provision was held to be constitutional. "Delivery, in the absence of all other proof," says the court, "is made sufficient evidence of sale—sufficient when no other proof is offered. It is open to disproof from every source. It may be explained by attendant circumstances. The party delivering is not estopped by the fact of delivery. . . . The fact of delivery is deemed sufficient, if not explained by the circumstances accompanying the delivery, or if the inference is not negatived by disproof." *State v. Hurley*, 54 Me. 562.

CHAPTER V.

BEST AND SECONDARY EVIDENCE.

- § 28. *Characteristics of Best and Secondary Evidence.*
- 29. *Foundation for Secondary Evidence.*
- 30. *Relaxation of the Rule in Certain Cases.*
- 31. *Notice to Produce.*

§ 28. **Characteristics of Best and Secondary Evidence.**—One dominant law of evidence that is without relaxation and at all times in the ascendancy, is that demanding the best attainable evidence of which the case is susceptible. Bench, bar and commentator are alike agreed upon this postulate, and it is enforced with precision, both in this country and in England. The United States Supreme Court, through *Mr. Justice Nelson*, delineates the rule with admirable lucidity. In a case that is still quoted with approbation, and as a pertinent exposition of the subject under review, an excerpt from the opinion is inserted:

“One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in the technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question, but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party’s possession or power; because the absence of the primary evidence raises a presumption, that, if produced, would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.” *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957.

On prior and on subsequent occasions the same court has announced a similar principle, and we may safely affirm that it is a

cardinal feature of evidentiary law as administered in this country. No evidence shall be received, which presupposes better evidence in the party's possession, and this rule may be regarded as established beyond question. *Taylor v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Cooke v. Woodrow*, 9 U. S. 5 Cranch, 13, 3 L. ed. 22; *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 982; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409; *McPhaul v. Lapsley*, 87 U. S. 20 Wall. 264, 22 L. ed. 344.

The rule that the best evidence must be produced which the nature of the case admits, means, not that the courts require the strongest possible assurance, but that no evidence shall be admitted which presupposes greater evidence in the party's favor. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 8 L. ed. 424.

The reason of the rule that secondary or inferior evidence shall not be substituted for any evidence of a higher nature which the case admits of, is that the attempt to substitute the inferior for the higher implies that the higher would give a different aspect to the case of the party introducing the lesser. *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527; *Taylor v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409. The reasons calling for the production of the best evidence of which the case is susceptible in civil cases, are of equal weight and cogency in criminal prosecutions. Chief Justice Parsons in a criminal case decided in 1808, sententiously announces the rule in the following language: "It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted." *Com. v. Kinison*, 4 Mass. 646.

§ 29. **Foundation for Secondary Evidence.**—In accounting for the absence of a writing material to the case, so as to let in secondary evidence of its contents, no universal rule can be declared which will be applicable under all circumstances. The testimony is addressed to the presiding judge, and he pronounces on its sufficiency. He must be reasonably convinced that it has been destroyed, is lost, or is beyond the reach of the court's process. A material inquiry in such cases is, whether or not there was a probable motive for withholding this highest and best evidence. Whenever the court is able to answer this inquiry in the negative, less evidence will satisfy its conscience, than if suspicious

circumstances attended the transaction. As a rule there must be a careful search at the place at which it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would likely be found. *Jernigan v. State*, 81 Ala. 58.

A foundation for secondary evidence is not laid by the state, by showing that the original document is not in the possession of the prosecuting witness, as he is not the party offering the evidence. *State v. Penny*, 70 Iowa, 190.

Proof must be given of the exercise of reasonable diligence in the effort to procure the original. The circumstances must be indeed exceptional which would warrant the assertion that the efforts of the plaintiff in this case to produce the original were reasonably diligent. *Deaver v. Rice*, 25 N. C. 280; *Dickinson v. Breeden*, 25 Ill. 186; *Ralph v. Brown*, 3 Watts. & S. 395; *Shepard v. Giddings*, 22 Conn. 282; *Wood v. Cullen*, 13 Minn. 394; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. Rep. 527; *Floyd v. Mintsey*, 5 Rich. L. 361; *Turner v. Yates*, 57 U. S. 16 How. 14, 14 L. ed. 824; *Simpson v. Dall*, 70 U. S. 3 Wall. 460, 18 L. ed. 265; *Blackburn v. Crawford*, 70 U. S. 3 Wall. 175, 18 L. ed. 186; *Jackson v. Frier*, 16 Johns. 193; *Taunton Bank v. Richardson*, 5 Pick. 436; *Empire Transp. Co. v. Steele*, 70 Pa. 188.

Where the contents of an instrument alleged to have been destroyed are sought to be proved by oral evidence it is for the court to determine whether the evidence establishes the destruction, and whether, if established, the destruction was not intended to injure the opposite party or to create an excuse for its non-production. *Mason v. Libbey*, 90 N. Y. 683.

It is a sufficient excuse for the non-production of a document to trace it to the possession of one interested in retaining it, and who, were he subpoenaed to produce it, could refuse to do so, on the ground that it would tend to criminate him. *Abbott*, Trial Brief, § 452, citing *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 366, 8 L. ed. 424, 429; *State v. Kimbrough*, 13 N. C. 431.

In civil cases it has been repeatedly held that where the paper or document wanted in evidence has been traced to the possession of a certain party, that party must be produced to prove its loss, and if beyond the jurisdiction of the court his testimony must be taken by deposition or a reasonable excuse given for the failure. It must also appear that the party offering secondary evidence

show that he has exercised good faith and reasonable diligence in seeking for the primary evidence, and that he has explored with reasonable fidelity all sources of information the case would naturally suggest. *Simpson v. Dall*, 70 U. S. 3 Wall. 460, 475, 18 L. ed. 265, 267; *Deaver v. Rice*, 24 N. C. 280; *Parkins v. Cobbitt*, 1 Car. & P. 282; *Dickinson v. Breeden*, 25 Ill. 186; *Turner v. Yates*, 57 U. S. 16 How. 14, 14 L. ed. 824; *Bunch v. Hurst*, 3 Desaus. Eq. 273, 5 Am. Dec. 551.

§ 30. **Relaxation of the Rule in Certain Cases.**—Before secondary evidence is admissible as to the contents of a lost instrument, it must appear that due search was made for the same in the place where it was last seen or where it is most likely to be found, and the rigor with which this search is prosecuted must be proportioned to the value of the instrument sought. Slight proof of loss is sufficient where the paper is of a transient character such as a monthly receipt for a gas or water bill. On the other hand the last will and testament, or valuable muniments of title, call for protracted effort in the way of search; as to what constitutes sufficient search in each instance must be regarded as a question for the trial court, to be determined by the facts disclosed.

The rule that when the non-production of a written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be given, is applicable to criminal as well as civil suits. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 365, 8 L. ed. 424, 429. As we have seen, there is no universal rule as to the necessary foundation for the introduction of secondary evidence; but the presiding judge must be reasonably satisfied that the document is lost, destroyed or beyond the jurisdiction of the court. When no probable motive appears for withholding the document, less evidence is required than under suspicious circumstances. *Jernigan v. State*, 81 Ala. 58; *Hawn v. State*, 13 Tex. App. 383, 44 Am. Rep. 706.

The rule excluding secondary evidence does not apply to matter not relevant to the merits, but drawn out on cross-examination to test the temper and credibility of the witness, except that if the contents of a document are sought to be used to discredit or contradict the witness, as containing his own statements contrary to his testimony, the original, not a copy, must be produced. *Abbott*, Trial Brief, § 436, citing *Klein v. Russell*, 86 U. S. 19

Wall. 439, 464, 22 L. ed. 116, 124; *Kalk v. Fielding*, 50 Wis. 339; *Newcomb v. Griswold*, 24 N. Y. 298; *Pratt v. Norton*, 5 Thomp. & C. 8; *Nash v. Hunt*, 116 Mass. 237.

§ 31. **Notice to Produce.**—Due notice, according to the rules of evidence, to produce papers required at trial must be given. It may occasionally be desirable to obtain from the court a preliminary order permitting the inspection, before trial, of something in the opposite party's possession. For example, on an indictment being found for sending a threatening letter, the court, on the defendant's motion, ordered the letter to be deposited with an officer of the court for the inspection of the witnesses for the defense. In case of a homicide by alleged poisoning, where the contents of the deceased person's stomach were in the possession of the police, having been examined by experts on the part of the execution, the court, on the defendant's application, made an order permitting an expert nominated by the latter to examine them in the presence of the other experts. 1 Bishop, Crim. Proc. §§ 959–959e, citing *Reg. v. Barker*, 1 Fost. & F. 326; *State v. Wisdom*, 8 Port. (Ala.) 511; *State v. Gurnee*, 14 Kan. 111; *Rex v. Harrie*, 6 Car. & P. 105; *Reg. v. Spry*, 3 Cox, C. C. 221; *Word v. Com.* 3 Leigh, 743; *State James*, 37 Conn. 355; *Fahay v. State*, 25 Conn. 205.

If the indictment itself alleges that the accused is the custodian of the document needed in evidence or where the evidence in the case shows it to be in his possession or in that of an accomplice who refuses to produce it on the ground of its criminating tendency, the state is not obliged to give notice to produce. See Abbott, Trial Brief, § 454, citing *State v. Mayberry*, 48 Me. 218; *People v. Holbrook*, 13 Johns. 90; *McGinnis v. State*, 24 Ind. 500; *Com. v. Messenger*, 1 Binn. 273, 2 Am. Dec. 441; *Rollins v. State*, 21 Tex. App. 148; *Howell v. Huyck*, 2 Abb. App. Dec. 423; *Lawson v. Bachman*, 81 N. Y. 616; *State v. Parker*, 1 D. Chip. 298, 11 Am. Dec. 735; *State v. Gurnee*, 14 Kan. 121; *United States v. Doeblor*, 1 Baldw. 519.

Generally, however, where the prosecution undertakes to show the contents of a criminating document, it must duly serve a notice to produce; and should the accused neglect to furnish the paper or document required, secondary evidence of its contents are admissible on the part of the state. *McGinnis v. State*, 24 Ind. 500; *Armitage v. State*, 13 Ind. 441.

The rule that the calling for the production of papers and in-

specting them makes them evidence does not obtain in the state of New York. *Abbott*, Trial Brief, 89; *Kenny v. Van Horn*, 1 Johns. 394; *Stalker v. Gaunt*, 12 N. Y. Legal Obs. 132; *Sayer v. Kitchen*, 1 Esp. 210; *Carr v. Gale*, 3 Woodb. & M. 38; *Austin v. Thompson*, 45 N. H. 113; *Withers v. Gillespy*, 7 Serg. & R. 14; 2 Phil. Ev. 537; *Coote v. Bank of United States*, 3 Cranch, C. C. 50; *Wallar v. Stewart*, 4 Cranch, C. C. 532; *Jordan v. Wilkins*, 2 Wash. C. C. 482; *Blake v. Russ*, 33 Me. 360; *Randel v. Chesapeake & D. Canal Co.* 1 Harr. (Del.) 233; *Clark v. Fletcher*, 1 Allen, 53; *Long v. Drew*, 114 Mass. 77; *Wooten v. Nall*, 18 Ga. 609; *Anderson v. Root*, 8 Smedes & M. 362.

Whatever may be the rule as to the right of the party producing a paper upon notice, to offer it in evidence, or to require the party calling for it after an inspection to put it in evidence, it has never been claimed that evidence which is utterly immaterial could be, or be required to be, put in. *Abbott*, Trial Brief, 89; *Wilson v. Bowie*, 1 Car. & P. 10; *Hylton v. Brown*, 1 Wash. C. C. 343; 2 Phil. Ev. 537; *Withers v. Gillespy*, 7 Serg. & R. 14; *Clark v. Fletcher*, 1 Allen, 53.

It is well settled in criminal cases that the court cannot compel the defendant to produce an instrument in writing in his possession, to be used in evidence against him, as to do so would be to compel the defendant to furnish evidence against himself, which the law prohibits. . . . It is difficult to perceive what benefit could result, either to the state or to the defendant, from the giving of such a notice, while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury, upon his refusal to produce it after notice. *McGinnis v. State*, 24 Ind. 500.

A copy of a material paper is admissible in evidence against one who, having the original in his possession, fails to produce it on notice. *Com. v. Shurn*, 145 Mass. 150.

Reduced to digest form the rules relating to the subject may be summarized as follows:—

If the writing is in the custody of the adverse party, he must first have reasonable notice to produce it. If he fails to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary when the writing is a notice, or when it has been wrongfully obtained or withheld by the adverse party. If a party refuses to produce a document in

his possession after notice to do so, and compels the adverse party to give secondary evidence thereof, he cannot afterwards offer either the paper or secondary evidence of its contents, without permission of the court.

There is nothing in the foregoing requirements that compels a party calling for a certain document or writing to offer it in evidence if upon inspection it may appear to be irrelevant in its tendency or disappointing in its effect, and in either event there is nothing in the mere fact of having noticed the party to produce it that entitles it to any exceptional treatment.

For further elucidation affecting this topic see 1 Rice, Civil Evidence, chap. 6.

CHAPTER VI.

DOCUMENTARY EVIDENCE.

§ 32. *Term Defined.*

33. *Public Documents in Evidence.*

a. *Examined Copy.*

b. *Recent State Legislation on the Subject.*

c. *The Rule in California.*

d. *The Rule in New York.*

e. *Rule in United States Courts.*

34. *Refreshing Memory by the Use of.*

a. *Private Accounts and Documents Obtained by Seizure.*

35. *The English Rule.*

36. *Parol Evidence as Affecting.*

37. *Maps, Charts, etc., in Evidence.*

§ 32. **Term Defined.**—"Written document" has been defined as "that which conveys information; that which furnishes evidence or proof; a written or printed instrument. An instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidently used." 1 Whart. Ev. § 614; Anderson, Law. Dict. title *Document*.

"Recent statutes having used the term 'document' to designate the objects of forgery, as well as in some measures of larceny, it becomes our duty to inquire, in the first place, what the term 'document' includes. And the answer is that a document, in this sense, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidently used. In this sense the term document applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded." Wharton, Crim. Ev. § 519.

Under this term are properly included all material substances on which the thoughts of men are represented by writing or any other species of conventional mark or symbol; this is the comprehensive definition by Best. Sir James Stephen's definition is more

restricted: "Any substance having any matter expressed or described upon it by marks capable of being read." Stephen, Dig. Ev. art. 1.

Chamberlain, in his valuable annotations on the treatise of Best, at page 215, comments suggestively as follows: "Within these definitions, a ring or banner with an inscription, a musical composition, and a savage tattooed with words intelligible to himself, would all be documents. Photographs, caricatures, wooden tallies, and the like, would probably be excluded under Stephen's definition, not apparently under the others."

While the sweeping definitions here given are probably sufficiently accurate for the purpose of distinguishing documentary from personal evidence, it may be doubted whether the definition of "document" could not with advantage be narrowed to the single case of writing as a means of conveying thought in certain instances. Thus it is submitted, the so-called "best evidence rule" applies only to written documents. Thus, for example, in *Com. v. Morrell*, 99 Mass. 542, it was held that a tag of a valise on which words were inscribed was not a document. But see *Memphis & C. R. Co. v. Maples*, 63 Ala. 601.

Public documents include "an instrument of record concerning the business of the people at large, preserved in or emanating from any department of government; also, a publication printed or issued by order of one or both houses of Congress or of a state legislature." Anderson, Law Dict. title *Document*.

Public documents include also state papers, maps, charts, and like formal instruments, made under public auspices. A copy of such document, issued by public authority, is as valid as the original; as, an officially published statute. The term also embraces official records required to be kept by statute. See *McCall v. United States*, 1 Dak. 321; 1 Supp. Rev. Stat. pp. 154, 288.

There are records which partake both of a public and private character, and are treated as the one or the other, according to the relation in which the appellant stands to them. The books of a corporation are public with respect to strangers. Haines, Justices of Peace, 677.

The California Code of Civil Procedure, after dividing all writings into two kinds, viz: public and private, declares public writings to be: "1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public

officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state or of a foreign country. 2. Public records of public writings." Cal. Code Civ. Proc. (1888) § 18.

Public documents, presumptively, contain the records made by the public functionaries in the executive, legislative and judicial departments of the government. They import necessarily a high degree of credibility. Their recitals are supposed to contain authentic memoranda of what especially concerns the general public. And they are frequently the memorials and repositories of both vested and inchoate rights. It is contrary to public policy and the rules of effective government to allow them to be disturbed. In rare instances, where clerical error can be disclosed, or where fraudulent practices can be established, a public document can be assailed and its force and effectiveness utterly vitiated. But from a very early period these documents have been open to inspection at all reasonable hours, and frequently where written and other documents are in the official custody of some officer of the court, inspection may be had upon due application and an order granted. *Rex v. Staffordshire*, 6 Ad. & El. 99; *Atherfold v. Beard*, 2 T. R. 610; *Stone v. Crocker*, 24 Pick. 88.

§ 33. **Public Documents in Evidence.**—The statutory law of the various states makes ample provision for the introduction of public documents in evidence and indicates the method to be adopted. Many of the principles which underlie the introduction of judicial records in evidence apply to the principle under discussion. It will be remembered that not only are the judicial proceedings of the courts of any state admitted in evidence, when properly attested, but the records also are entitled to the same privilege. The language of the congressional Act is "the records and judicial proceedings of the courts of any state shall be proved if admitted in any other state in the United States by the attestations of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." Act of May 26, 1790, § 1; 1 Story, U. S. Const. 93. This Act was passed pursuant to the Constitution, conferring the power upon Congress to prescribe the manner in which public acts, records and judicial proceedings of one state shall be proved in any other state and the effect to be given to them. U. S. Const. art. 4, § 1.

The Act prescribes the persons by whom the records shall be attested, but the form of the attestation, and that alone, is not prescribed, but must conform to the usage of the state in which the record is, and not to that of the United States or of the state in which it is to be used in evidence. *Morris v. Patchin*, 24 N. Y. 395, 82 Am. Dec. 311.

Judge Allen in the above entitled cause lays down the rule that the clerk alone can certify under this statute, and that the certificate of his under clerk in his absence is incompetent.

We do not think the various provisions of the state constitutions securing to the defendant in a criminal prosecution the right "to be confronted with the witnesses against him," can apply to the proof of facts in their nature essentially and purely documentary, and which can only be provided by the original, or by a copy officially authenticated in some way especially when the fact to be proved comes up collaterally. *People v. Jones*, 24 Mich. 215.

The Constitution of the United States (Amendment VI.) contains the same provision in the same words; yet, upon an indictment for arresting a person accredited as a foreign minister, contrary to an Act of Congress, it has been held that the certificate of the Secretary of State (of the United States) that the person had been so recognized by the Department of State, was full evidence of the fact (*United States v. Benner*, 1 Baldw. 234); and so upon an indictment for an assault and battery upon an attaché and secretary to the legation of Spain, such certificate was held the highest and best evidence. *United States v. Liddel*, 2 Wash. C. C. 205. Yet, the fact certified to was much more directly in issue, and more essential to the offense charged, than in the present case. See also *United States v. Ortega*, 4 Wash. C. C. 531.

Roscoe and Wharton, and other writers upon evidence in criminal cases, in support of the doctrines which they lay down touching this matter of the production and use of documents as evidence, cite civil as well as criminal cases, and Roscoe says, that the rules of evidence with regard to the proof of documents, are the same in both.

The general doctrine, as stated by them all, is substantially this, that records and entries of a public nature, in books required by law to be kept, may be proved by an examined copy, and by a certified copy where the officer having charge of the record is

authorized by law to make copies to be used as evidence, both for the sake of convenience and because of the public character of the facts they contain, and the ease with which any fraud or error in the copy can be detected. Roscoe, Crim. Ev. (6th Am. ed.) 148, *et seq.*, 157, 160; 1 Whart. Am. Crim. Law, § 654; 1 Greenl. Ev. (1st ed.) § 91.

So where a person is served by a *subpœna duces tecum* to produce a document, which is of itself competent evidence, or may be identified by some one else, it is not necessary to have him sworn or to put him on the stand. *Perry v. Gibson*, 1 Ad. & El. 32, cited in Roscoe, Crim. Ev. 101; *State v. Frederic*, 69 Me. 400.

a. Examined Copy.—The most felicitous evasion of the embarrassments frequently encountered, under the old practice in introducing public documents in evidence is by “examined copy,” that is, a copy sworn to be a true copy by a witness who has compared it carefully with the original. This mode of proof avoids much inconvenience. There is an insuperable objection to the actual production of the original documents themselves. They are, comparatively speaking, little liable to abstraction, alteration or misrepresentation. The entire community are interested in their preservation. With but few exceptions they are subject to daily inspection, and they are frequently required for evidentiary purposes, so frequently, in fact, as to be demanded in several places at the same time. Obviously this constant handling and bandying would result in mutilation and loss, and the rule of “examined copy” avoids much confusion, delay and hardship.

b. Recent State Legislation on the Subject.—Colorado legislation illustrates the latest phase of statutory enactment concerning this subject of public documents. Its Code of Civil Procedure, as amended in 1889, provides:

“A copy of any document or record or paper, in the custody of a public officer of this state or of the United States, within this state, certified under the official seal, or verified by the oath of such officer to be a true, full and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in the like manner, and with the like effect as the original could be if produced.” Rice, Ann. Code Civ. Proc. § 422.

It must be remembered, however, that courts do not take ju-

dicial notice of the statutes of other states. They must be set out in the pleadings, and proved like other facts. *Polk v. Butterfield*, 9 Colo. 325; *Hanley v. Donohue*, 116 U. S. 1, 29 L. ed. 535; *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431; *Talbot v. Seeman*, 5 U. S. 1 Cranch, 1, 2 L. ed. 15; *Strother v. Lucas*, 31 U. S. 6 Pet. 763, 8 L. ed. 573; *Armstrong v. Lear*, 33 U. S. 8 Pet. 52, 8 L. ed. 863; *United States v. Wiggins*, 39 U. S. 14 Pet. 334, 10 L. ed. 481; *Priestman v. United States*, 4 U. S. 4 Dall. 28, 1 L. ed. 727; *United States v. Turner*, 52 U. S. 11 How. 663, 13 L. ed. 857; *Pennington v. Gibson*, 57 U. S. 16 How. 65, 14 L. ed. 847; *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94; *Frith v. Sprague*, 14 Mass. 455; *Hooper v. Moore*, 50 N. C. 130; *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605; *Woodrow v. O'Connor*, 28 Vt. 776; *Bean v. Briggs*, 4 Iowa, 464; *Eastman v. Crosby*, 8 Allen, 206.

c. **The Rule in California.**—Official documents may be proved as follows :

1. Acts of the executive of the state, by the records of the state department of the state, and of the United States, by the records of the State Department of the United States, certified by the heads of those departments, respectively. They may also be proved by public documents, printed by the order of the legislature or Congress, or either house thereof.

2. The proceedings of the legislature of this state, or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statements or resolutions, or by copies certified by the clerk, or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy certified by the legal keeper thereof, or by a printed book published by the authority of such a corporation.

6. Documents of any other class in this state, by the original or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original or by a copy certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States Government, by the certificate of the legal custodian thereof. Cal. Code Civ. Proc. § 1918.

d. The Rule in New York.—First as typical of code legislation the New York Code of Civil Procedure is cited as follows:

“STATUTES, ETC., HOW PROVED, § 932.—A statute, or joint resolution, passed by the legislature of the state, may be read in evidence, from a newspaper, designated, as prescribed by law, to publish the same, until six months after the close of the session at which it was passed; and, at any time, from a volume printed under the direction of the secretary of state.

“COPIES OF RECORDS AND PAPERS IN CERTAIN OFFICES, PRESUMPTIVE EVIDENCE, § 933.—A copy of a paper filed, kept, entered or recorded, pursuant to law, in a public office of the state, the officer having charge of which has, pursuant to law, an official seal; or with the clerk of the court of a state; or with the clerk or secretary or either house of the legislature, or of any other public body or public board created by authority of a law of the state, and having, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original, or by his deputy or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary, or clerk of the public body or board, appointed pursuant to law, under his hand, and, except where it is certified by the clerk or secretary of either house of the legislature, under the official seal of the body or board.

"PAPERS FILED WITH TOWN CLERK, § 934.—A copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original."

e. Rule in United States Courts.—The records of courts of the United States are proved by exemplified copies, under the seal of the court, and certified by the clerk. *Pepoon v. Jenkins*, 2 Johns. Cas. 119. And by Act of May 14, 1845, it is provided that a copy of any records and proceedings of the district and circuit courts of the United States may be received in evidence in all courts of the state of New York when certified by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original, and attested by the official seal of such officer. Laws 1845, chap. 303.

Desty, Fed. Proc. § 906, states the rule of the Federal courts, regulating the admission of testimony. The language is: "All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate.

Modern legislation has made ample provision for the introduction of public documents in evidence, and while these various provisions vary somewhat in phraseology, the scope and meaning of their various recitals is substantially the same.

Written laws may be proved by properly authenticated copies; unwritten by parol testimony of experts. *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472. Foreign laws must be proved like other facts; they must be verified by oath, or by some high authority not less to be respected than the oath of an individual. *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249. A copy of an instrument can be admitted in evidence only upon being proved a true copy. *Smith v. Carrington*, 8 U. S. 4 Cranch, 62, 2 L. ed. 550. Where copies are made evidence by statute, the mode of authentication must be strictly pursued. The legislature may establish new rules of evidence in derogation of the common

law, but the judicial law is limited to the rule laid down. *Smith v. United States*, 30 U. S. 5 Pet. 292, 8 L. ed. 130.

Federal courts also provide for the proof of laws and legislative records. The public laws of a state may be read in these courts, and the exercise of any authority which they contain may be deduced historically from them; but private laws and special proceedings are governed by a different rule. *Leland v. Wilkinson*, 31 U. S. 6 Pet. 317, 8 L. ed. 412; *Course v. Stead*, 4 U. S. 4 Dall. 22, 1 L. ed. 724.

Printed journals of either house of a legislature published in obedience to law, are competent evidence of its proceedings. *Post v. Kendall County Suprs.* 105 U. S. 667, 26 L. ed. 1204; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154.

A pamphlet of the laws of a sister state, purporting to be printed by the law printer, is admissible in evidence. *Thompson v. Musser*, 1 U. S. 1 Dall. 458, 1 L. ed. 222.

Under the congressional Act of May 26, 1790, chap. 38, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts in the courts of other states of the Union. No other formality is required than the annexation of the seal, which will be presumed to have been done by an officer having custody thereof and competent authority to affix it. *United States v. Amedy*, 24 U. S. 11 Wheat. 392, 6 L. ed. 502; *United States v. Johns*, 4 U. S. 4 Dall. 412, 1 L. ed. 888.

It is now well settled that the statute books of a sister state purporting to be published under the authority of the state are competent proof of its statute law. *Young v. Bank of Alexandria*, 8 U. S. 4 Cranch, 384, 2 L. ed. 655; *Raynham v. Canton*, 3 Pick. 295; *Mullen v. Morris*, 2 Pa. 85; *Danforth v. Reynolds*, 1 Vt. 265; *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754. A foreign statute may be proved by the testimony of a practicing attorney of that jurisdiction; but resort to this grade of evidence is not favored. *Kopke v. People*, 43 Mich. 41.

§ 34. **Refreshing Memory by the Use of.**—A document which may be inadmissible intrinsically and *per se* as primary or secondary evidence, either because it does not embody the substance of the issue, or because it is in the nature of hearsay, will often be admissible to refresh the memory of a witness, and to enable him to speak on the matters to which it refers.

It appears that such a document may be handed to a witness for inspection, and that the witness may give oral evidence accordingly, after a perusal of its contents:—

1. When the writing actually revives in his mind a recollection of the facts to which it refers.

2. When, although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain an accurate statement of such facts.

3. When, although the writing revives neither a recollection of the facts nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made unless the facts which it purports to describe had occurred accordingly. Powell, Ev. (4th ed.) 359, 360.

It is not necessary that the memorandum should have been actually made by the witness, if he can otherwise make it an original source of personal recollection. Thus, a witness has been allowed to refresh his memory from a paper which he remembers to have recognized as a correct narrative when the facts were fresh in his memory. *Duchess of Kingston's Case*, 20 How. St. Tr. 619.

There is no precise time within which a writing must be shown to have been made before it can be used by a witness. It is not necessary that it should have been made contemporaneously with the occurrence of the fact; but it ought to have been made soon afterwards, or at least within such a subsequent time as will support a reasonable probability that the memory of the witness had not become impaired when the statement was committed to paper. Powell, Ev. (4th ed.) 362, 363.

It appears to be only necessary that the witness should swear positively that the memorandum was made at a time when he had a distinct recollection of the facts, and *ante litem motam*. *Wood v. Cooper*, 1 Car. & K. 646.

The memorandum must either have been made by the witness or recognized by him, at or about the time when it was made, as a correct account. It must not contain any of the elements of hearsay, and it will therefore be inadmissible if it appear to be the statement of a third person (*Anonymous*, Ambl. 252) as where it had been drawn up by such a person from the witness's own memoranda; or even if it be a copy made by the witness himself from

his own original memoranda. *Jones v. Stroud*, 2 Car. & P. 196. The rule is consistent with the general principles of secondary evidence, by which the copy of a copy, unless in the nature of a duplicate original, is entirely inadmissible, and corresponds with the express dictum of *Mr. Justice Patteson*, that "the copy of an entry, not made by the witness contemporaneously, does not seem to be admissible for the purpose of refreshing a witness's memory." *Burtod v. Plummer*, 2 Ad. & El. 343.

All copies and duplicates should be shown to the respective counsel as it is well settled that whenever a writing has been shown to a witness it may be inspected by the opposite party, and if proved by the witness, must be read in evidence before his testimony is closed, or it cannot be so read, except on recalling the witness, or with the permission of the court.

a. Private Accounts and Documents Obtained by Seizure.—Public officials in their zeal to serve the commonwealth, seem totally ignorant of the fact, that private books, memoranda, documents and papers in the possession of the accused, are not evidence against him, when they are produced by the instrumentality of a search warrant, or in any other way are brought before the court by compulsion. So, too, there is general misconception as to the effect or failure of the accused to produce such books and documents. Such failure is not an admission of the charges the state claims it could prove; and where it has been sought to foist upon the statute book legislation to that effect, it may be wholly disregarded by the accused, and treated as an unconstitutional enactment. These views are sanctioned by a recent decision of the Supreme Court of the United States in which *Mr. Justice Bradley*, writing for reversal outlines the subtle distinction that should pervade this entire grade of evidence. *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746.

§ 35. **The English Rule.**—The English rules of evidence relating to this subject are stated by Sir James Stephen in the following language:

"The contents of documents may be proved either by primary or by secondary evidence. Art. 63.

"Primary evidence means the document itself produced for the inspection of the court, accompanied by the production of an attesting witness, in cases in which an attesting witness must be called, under the provision of articles 66 and 67, or an admission

of its contents proved to have been made by a person whose admissions are relevant under articles 15–20.

“Where a document is executed in several parts, each part is primary evidence of the document.

“Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

“Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest; but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.” Art. 64.

“The contents of documents must, except in the cases mentioned in article 71, be proved by primary evidence; and in the cases mentioned in article 66 by calling an attesting witness.” Art. 65.

“If a document is required by law to be attested, it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the court, until one attesting witness at least has been called for the purpose of proving its execution.

“If it be shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

“The rule extends to cases in which—

the document has been burnt, or cancelled (or lost);

the subscribing witness is blind;

the person by whom the document was executed is prepared to testify to his own execution of it;

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause, unless such admission be made for the purpose of, or has reference to the cause.” Art. 66.

“In the following cases, and in the case mentioned in article 88 but in no others, a person seeking to prove the execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or any

attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under article 71 (a);

(2) When his opponent produces it when called upon; and claims an interest under it in reference to the subject-matter of the suit;

(3) When a person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, and who has dealt with it as a document duly executed.” Art. 67.

“If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.” Art. 68.

“An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.” Art. 69.

“Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies;

(2) Other copies made from the original and proved to be correct;

(3) Counterparts of documents as against the parties who did not execute them;

(4) Oral accounts of the contents of a document given by some person who has himself seen it.” Art. 70.

“Secondary evidence may be given of the contents of a document in the following cases:

“(a) When the original is shown or appears to be in the possession or power of the adverse party, and when, after the notice mentioned in article 72, he does not produce it;

“(b) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court;

“(c) When the original has been destroyed or lost, and proper search has been made for it;

“(d) When the original is of such a nature as not to be easily movable, or is in a country from which it is not permitted to be removed;

“(e) When the original is a public document;

“(f) When the party has been deprived of the original by fraud so that it cannot be procured;

“(g) When the original is a document for the proof of which special provision is made by an Act of Parliament, or any law in force for the time being; or

“(h) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection; provided that that result is capable of being ascertained by calculation.

“Subject to the provision hereinafter contained, any secondary evidence of a document is admissible.

“In case (h), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

“Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge, unless in deciding such a question the judge would in effect decide the matter in issue.” Art. 71.

“Secondary evidence of the contents of the documents referred to in article 71 (a) may not be given, unless the party proposing to give such secondary evidence has,

“If the original is in the possession or under the control of the adverse party, given him such notice to produce it as the court regards as reasonably sufficient to enable it to be procured; or has,

“If the original is in the possession of a stranger to the action, served him with a subpoena *duces tecum* requiring its production;

“If a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served him with the subpoena to give secondary evidence of the contents of the document.

“Such notice is not required in order to render secondary evidence admissible in any of the following cases:

“(1) When the document to be proved is itself a notice;

“(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production;

“(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpoenaed to produce it;

"(4) When the adverse party or his agent has the original in court." Art. 72.

§ 36. **Parol Evidence as Affecting.**—Parol evidence is always admissible to show that any document offered as a record or transcript or certified copy is a mere forgery. *State v. Gonce*, 79 Mo. 600. But where there is no indicia of fraud a judicial record is evidence of a higher record and is received as conclusive proof of every fact material to the decision embodied in it. Public records are provable not only by the introduction of the original document, but a duly authenticated copy will have the same effect. *State v. Voight*, 90 N. C. 741. Records of conviction and sentence for crime are frequently proved in this manner. *State v. Blaisdell*, 59 N. H. 328.

§ 37. **Maps, Charts, etc., in Evidence.**—In the celebrated Tichborne case which enlisted the best legal talent of the day, *Lord Ch. J. Cockburn* admitted a map of Australia in evidence for the purpose of locating various places of interest. It is believed this practice will commend itself very generally, even in the entire absence of facts tending to show the sources of information open to the publishers of the map touching the accuracy of their outline. A map of public lands made by public surveyors pursuant to law which is duly certified and filed, is always admissible in civil or criminal cases. *People v. Denison*, 17 Wend. 312.

The English rule upon this subject finds appropriate expression in Stephen, Dig. Ev. art. 37: "Statements as to matters of general public history, made in accredited historical books, are relevant, when the occurrence of any such matter is in issue or relevant to the issue; but statements in such works as to private rights or customs are irrelevant. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps, or charts, are themselves relevant facts; but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents."

Restated, the proposition amounts to this: "Historical works, mathematical works, and published maps or charts, when made by a person indifferent between the parties, are relevant as evi-

dence of matters of public and general interest." So, whenever an object other than a writing cognizable by the senses is a relevant fact, such object may be exhibited to the jury, or its existence, situation and character may be proved by other evidence.

The importance of this subject under any scheme of evidence must be apparent and accordingly it has received ample consideration in 1 Rice, Civil Evidence, chap. 7. The text occupies over 78 pages, and generally speaking, applies with equal force to both civil and criminal cases.

CHAPTER VII.

RELEVANCY.

- § 38. *Preliminary View, Term Defined.*
- 39. *Evidence Confined to the Point in Issue.*
- 40. *Relevancy, how Determined.*
- 41. *The Attributes of Relevancy.*
- 42. *Offer of Proof.*
- 43. *Indecency no Ground for Excluding Relevant Testimony.*

§ 38. **Preliminary View, Term Defined.**—Questions in regard to the relevancy of particular items of testimony always depend upon the peculiar circumstances of the case, and must be solved by the application of sound judgment and common sense. It very often happens, as practical men in the profession well know, that facts which in one state of the evidence and one aspect of the case are entirely irrelevant, suddenly, by a slight change in the conditions, become of controlling importance. Hence the necessity, which so often happens in attempting to taken written testimony, of introducing into a deposition so many facts which at first sight seem entirely irrelevant, but which may become admissible and important; hence, too, one reason why in criminal causes it is so important that the witnesses should testify in open court, and in the presence of the accused, in order that all their knowledge should be available to meet all the exigencies of the trial. It is for this reason that so many reported cases in the law of evidence are valuable, not so much for establishing principles of law, as for the illustration of those principles.

The word “relevant” means that the fact to which it is applied is so related to another fact, that, according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other. Stephen, Dig. Introduction.

The New York commissioners appointed to draft a code of evidence have elaborated this definition of Sir James Stephen and declare that any and all facts necessary to explain or introduce a fact in issue or relevant to the issue, or which support or

rebut an inference suggested by any such fact, or which establish the identity of anything or person whose identity is in issue, or is relevant to the issue, or which fix the time and place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was caused, or which afforded an opportunity for its occurrence or transaction, or which is necessary to show the relevancy of other facts, are relevant so far as they are necessary for those purposes respectively.

NOTE.—The following is an extract from a lecture delivered by Prof. Austin Abbott, L. L. D., to the students of the Class of '92 of the University of the City of New York, stenographically reported by Mr. Charles W. Thompson, and published in the *Columbia Law Times* of Nov., 1892. Its reproduction here is by permission:

When Macaulay undertook to prepare a code for India, and Fitz-James Stephen undertook to prepare a digest of the law of evidence, they undertook to turn the law of evidence the other end to, so to speak; to bring up the logical principles of evidence into view, emphasize them, make them explain everything they could, and to sink the traditionary, the technical, the arbitrary rules, to give a reason for every rule of evidence they could, or one reason which would explain all rules of evidence so far as possible, and to minimize the rules of evidence that didn't depend on logical principles. And the logical principle that they laid down as the key-note of all the rules of evidence is that any fact ought to be competent which according to the ordinary course of events renders probable or improbable the truth of a fact in issue; and they called that RELEVANCY. They dropped the word competency so far as possible; applied that to witnesses; but proposed this test: for instance, if the fact alleged is payment of money, if that is a fact in issue, is the circumstance that before this alleged payment the debtor had plenty of money and after that he did not have any, that before the alleged payment the creditor didn't have any money and afterwards he did have some, are those circumstances which tend to render probable the fact that that payment was made? In other words, they said that when a fact is in issue, any circumstance which according to the ordinary experience of human affairs tends to render probable any fact which would be the cause of the fact in issue, or would be an effect of that fact in issue, is relevant. Any fact which is the usual concomitant of that fact in issue is relevant. And so on.

They carried this use of the term very far. For instance, Stephen in his *Digest*, says that the opinion of a witness is relevant if he is an expert; it is not relevant if he is not an expert. Now that is not according to the ordinary use of language. We should say, does his opinion relate to this fact in issue? Yes. Well, then, it is relevant. It bears on the subject. Is he an expert? No. Well, then it is not competent. It is *relevant* in the ordinary sense of the term, but if he is not qualified to express an opinion it is not competent.

In the ordinary use of language, and in American law, relevant means *germane to the subject*. The danger of following Stephen's *Digest* of Evidence is that it

uses relevant in the sense of competent or admissible, and there has been more than one case lost by an attorney objecting that the evidence wasn't relevant in Stephen's sense of the word, when he didn't give the other side, or the Court, to understand that it wasn't competent.

I give you the Code of Evidence, and I advise you all who are interested in this question—I have only opened the door to it here—to read the preface to the report of the Commissioners in preparing that Code of Evidence. You will see how far they have gone. In that Code of Evidence they have adopted this use of the term relevant; and it runs all through the provisions of that Code. The definition of relevant is better than the use of it in this Code. That is to say, where one fact does render probable the existence of the other, it may be said to be germane to the subject, and the definition of relevant is not far out of the way there; but the use of the term as matter of practice on the trial of a case is not safely to be substituted for more specific objections to the nature of the evidence.

§ 39. **Evidence Confined to the Point in Issue.**—No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue; for where the prisoner is charged with an offense, it is of the utmost importance to him, that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. Russell, Crimes, chap. 2, p. 772, § 2. And see *People v. Stout*, 4 Park. Crim. Rep. 106; Whart. Am. Crim. Law, 292; Roscoe, Crim. Ev. 81; *Fox v. Clifton*, 6 Bing. 354; ——— v. ———, 1 Lead. Crim. Cas. 189; *LaBeau v. People*, 34 N. Y. 223; *Respublica v. Mulatto Bob*, 4 U. S. 4 Dall. 164, 1 L. ed. 777; *People v. Gardiner*, 6 Park. Crim. Rep. 158; *People v. Thompson*, 41 N. Y. 6; *Coleman v. People*, 58 N. Y. 555; *Cowley v. People*, 8 Abb. N. C. 1, 83 N. Y. 464.

The elementary rule of evidence, that the testimony must be confined to the points in issue, is based not only on the reason "that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors, and to excite prejudice and mislead, but, moreover, that the adverse party, having had no notice of such evidence, is not prepared to rebut it." 1 Taylor, Ev. § 298.

We are admonished by this distinguished author that "the due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that, while he shall reject as too remote every fact which merely furnishes a fanciful

analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble light on the question in issue." 1 Taylor, Ev. § 298; *Bloomer v. State*, 48 Md. 521.

That evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose, is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it. Then too when the ill concealed purpose of its introduction becomes obvious to the jury it often reacts against the party attempting to profit by the irregularity. *State v. Farmer*, 84 Me. 436.

Generally, then, it may be affirmed that when there is testimony which has any legal effect, it would be error in the court to determine the weight of it or the fact which it did or did not ascertain. But whether evidence tends to prove anything pertinent to the issue is a question for the court. *State v. Taunt*, 16 Minn. 109.

Relevancy may be further influenced by the intrusion of a bill of particulars. As in civil cases if either party has submitted such a bill, the evidence is restricted upon the trial to the specifications of the bill. *Com. v. Giles*, 1 Gray, 466; *State v. Rowe*, 43 Vt. 265.

The demand should be made before the commonwealth opens its case to the jury, and there is no prescribed formula in drawing the bill. If it sufficiently indicates the evidence to be adduced in establishing the general charge it is all that can be expected. *Com. v. Snelling*, 15 Pick. 321; *Com. v. Davis*, 11 Pick. 432.

A bill of particulars cannot be demanded as a matter of absolute right. Its issuance is largely within the scope of judicial discretion. But, instances occasionally arise where the refusal to order a bill of particulars amounts to so gross an abuse of discretion as to require the court to recognize it as ground of reversible error. *People v. McKinney*, 10 Mich. 54; *Com. v. Wood*, 4 Gray, 11.

A copy of the minutes of the grand jury may, in the discretion of the court, be ordered to be furnished to the accused when necessary to enable him to prepare for trial.

When the statements of an indictment are sufficiently definite

to advise the accused of the charge made against him he is not entitled to any further particulars; but where the counts are so general and embrace so many subjects that they do not advise the accused with sufficient distinctness of the charge in each made against him, the particulars as to these charges should be given to defendant so that he may be prepared to meet them. *People v. Bellows*, 2 N. Y. Crim. Rep. 12.

In this connection we will digress sufficiently to remind the practitioner that an exception should be taken to the ruling of the court in refusing to grant the bill, as, a writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken upon the trial. *Donohue v. People*, 56 N. Y. 211.

At common law the court has power to order a bill of particulars in any action, without regard to its nature, subject or form. Phil. Ev. 799; *Com. v. Snelling*, 15 Pick. 321; *Hancock's App.* 64 Pa. 470; *Early v. Smith*, 12 Ir. C. L. Rep. 35; *Wren v. Wield*, L. R. 4 Q. B. 213; Tidd, Pr. 526; *Vischer v. Conant*, 4 Cow. 396. The N. Y. code does not diminish but enlarges this power. See 158, 469. A bill of particulars may be ordered in an action of tort. *Com. v. Snelling* and *Early v. Smith*, *supra*; *Jones v. Bewicke*, L. R. 5 C. P. 32; *Vischer v. Conant* and *Wren v. Wield*, *supra*; *Doe v. Philips*, 6 T. R. 597; *Humphrey v. Cottley*, 4 Cow. 54; *Doe v. Broad*, 2 Scott, N. R. 685; *Kirwin v. Jones*, 3 Hodges, 230; *Johnson v. Birley*, 5 Barn. & Ald. 540; *Webster v. Jones*, 7 Dowl. & R. 774; *Davis v. Chapman*, 6 Ad. & El. 767. A bill of particulars may be ordered in a criminal proceeding. *Rex v. Hodgson*, 3 Car. & P. 445; *Rex v. Bootyman*, 5 Car. & P. 300; *Reg. v. Flower*, 3 Jur. 558; *Com. v. Giles*, 1 Gray, 466; *Rex v. Curwood*, 3 Ad. & El. 815; 1 Hawk. P. C. chap. 83, § 13; *Godard v. Smith*, 6 Mod. 261; *Com. v. Davis*, 11 Pick. 432; *Lambert v. People*, 9 Cow. 578, 587; *Com. v. Snelling*, *supra*. In an action of crim. con. or for divorce, an order for a bill of particulars is proper. *Higgs v. Higgs*, 11 Week. Rep. 154; *Sanderson v. Sanderson*, 20 Week. Rep. 261; *Codrington v. Codrington*, 3 Swab. & T. 368; *Bancroft v. Bancroft*, 3 Swab. & T. 610; *Winscom v. Winscom*, 3 Swab. & T. 380; *Porter v. Porter*, 3 Swab. & T. 796; *Grafton v. Grafton*, 28 L. T. N. S. 144; *Brown v. Brown*, L. R. 1 Prob. & Div. 46, 270; *Adams v. Adams*, 16 Pick. 254; *Shaw v. Shaw*, 2 Swab. & T. 642; *Greaves v. Greaves*, L. R. 2

Prob. & Div. 423; *Latour v. Latour*, 2 Swab. & T. 524; *Garraat v. Garraat*, 4 Yeates, 244; *Steele v. Steele*, 1 U. S. 1 Dall. 409, 1 L. ed. 199; *Hancock's Appeal*, 64 Pa. 470; *Gardner v. Gardner*, 2 Gray, 434; *Harrington v. Harrington*, 107 Mass. 329; *Wood v. Wood*, 2 Paige, 108, 112, 2 L. ed. 833, 835, 28 Am. Dec. 451; *Anonymous*, 17 Abb. Pr. 48; 2 Greenl. Ev. § 461; Bishop, Mar. & Div. § 315; *Morris v. Miller*, 4 Burr. 2057.

"It may be laid down as the result of the adjudications that the only proper office of a bill of particulars is to give information of the specific proposition for which the pleader contends in respect to any material issuable fact in the case, but not to disclose the evidence relied upon to establish any such proposition." *Ball v. Evening Post Pub. Co.* 38 Hun, 15. And the rule in relation to furnishing bills of particulars in criminal cases, as stated by Mr. Wharton in his work on Criminal Pleadings and Procedure, is: "that whenever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court on his application, will require the prosecution to furnish him with a bill of particulars of the evidence intended to be relied upon."

In *People v. Bellows*, 2 N. Y. Crim. Rep. 12, Mr. Justice Brady holds that when the statements in an indictment are sufficiently definite to advise the defendant of the charge against him, he is not entitled to any further particulars.

A motion for a bill of particulars is a motion addressed to the discretion of the court, and, as such, is not reversible error on a bill of exceptions. *Com. v. Giles*, 1 Gray, 466; *Com. v. Wood*, 4 Gray, 11; *Chaffee v. Soldan*, 5 Mich. 242; *State v. Hood*, 51 Me 364; *State v. Nagle*, 14 R. I. 331.

§ 40. **Relevancy, how Determined.**—Testimony is regarded as relevant, which has a tendency however remote, to establish a controverted fact. It should directly connect itself with the issues raised in such a manner as to assist in the determination of those issues. Hence the primary importance of a due regard for the scope and nature of the issue on trial, as it is quite obvious that evidence may be material and relevant as regards one of the issues while entirely incompetent and immaterial as regards the others. *Hovey v. Grant*, 52 N. H. 569; *Green v. Gilbert*, 60 N. H. 146; *Bedell v. Foss*, 50 Vt. 94; *Luce v. Hoisington*, 56 Vt. 436; *Raynes v. Bennett*, 114 Mass. 424; *Fitzgerald v. Pender-*

gast, 114 Mass. 368; *Martin v. Tobin*, 123 Mass. 85; *Brierly v. Davol Mills*, 128 Mass. 291; Whart. Crim. Ev. § 24; *Rex v. Pearce*, Peake, 75; *Rex v. Egerton*, Russ. & R. 375, cited by Holroyd, J., in *Rex v. Ellis*, 6 Barn. & C. 148; *Ferneaux v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East, 62; *Butler v. Watkins*, 80 U. S. 13 Wall. 457, 20 L. ed. 629; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319; *Eaton v. New England Teleg. Co.* 68 Me. 63; *Segar v. Lufkin*, 77 Me. 142; *Wiggin v. Scammon*, 27 N. H. 360; *Hill v. Crompton*, 119 Mass. 376; *People v. Horton*, 64 N. Y. 610; *Read v. Decker*, 67 N. Y. 182; *Pratt v. Richards Jewelry Co.* 69 Pa. 53; *Arnold v. Macungie Sav. Bank*, 71 Pa. 287; *Brooke v. Winters*, 39 Md. 505; *Tompkins v. Starr*, 41 Ohio St. 305; *Comstock v. Smith*, 20 Mich. 338; *Welch v. Ware*, 32 Mich. 77; *Willoughby v. Dewey*, 54 Ill. 266; *Hough v. Cook*, 69 Ill. 581; *Hall v. Stanley*, 86 Ind. 219; *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778; *Hancock v. Wilson*, 39 Iowa, 47; *Mann v. Sioux City & P. R. Co.* 46 Iowa, 637; *Johnson v. Filkington*, 39 Wis. 62; *Blakely v. Frazier*, 20 S. C. 144; *Baker v. Lyman*, 53 Ga. 339; *Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178; *Ashley v. Martin*, 50 Ala. 537; *Shealy v. Edwards*, 75 Ala. 411; *Ferguson v. Thacher*, 79 Mo. 511.

Restating the above proposition we may say that facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will against any particular person, or showing the existence of any state of body or bodily feeling are relevant, when the existence of any such state of mind or body or bodily feeling, is a fact in issue or relevant to the issue.

Any other facts are relevant from which the facts in issue are presumed, or are logically inferable, or which, having regard to the relation of cause and effect, or the ordinary motives of human conduct, or the usual sequence of events, would, considered by themselves, create a probability with respect to the facts in issue. See *note*, page 74.

§ 41. **The Attributes of Relevancy.**—To invest evidence with the attribute of relevancy, it must have a manifest tendency to prove or disprove the allegations of the indictment. Adhesion to this rule will exclude proof of collateral facts incapable of generating a legitimate presumption, that they will connect themselves with the question in dispute. A fact sought to be estab-

lished may be very remote in point of time and place from the issues involved, but if the trial court can still detect in the evidence offered a tendency to explain the issue, sound policy would insist upon its admissibility. Proffered evidence is always relevant which seeks to show a motive for the crime charged. *Green v. State*, 12 Tex. App. 51; *White v. State*, 72 Ala. 195; *Russell v. State*, 11 Tex. App. 288; *State v. Dearborn*, 59 N. H. 348.

Ordinarily the improper admission of evidence in favor of one party is no excuse for the subsequent admission of illegal testimony on the other side. But the supreme judicial court of Maine has held that if prejudicial evidence is admitted without objection on one side, the other party is entitled to introduce evidence however remote it may be from the main issue to contradict it. This view should meet with unanimous approval. *State v. Witham*, 72 Me. 531.

"It is sufficient, in order to make a question relevant, that the answer which it seeks to elicit will tend in some sensible degree to prove or disprove the fact in issue. It is not necessary that the answer, if believed, should in itself afford complete proof. It may be corroborative testimony merely, or a single link in a chain of circumstances, or a single fact in a collection of facts, neither of which is sufficient in itself, but all of which, when taken collectively, may be of sufficient probative force to carry conviction to the minds of the jurors. If, therefore, the answer to a question may tend to prove, or may form part of the proof of the matters alleged, though not wholly sufficient to prove them, the question may be asked." *Seller v. Jenkins*, 97 Ind. 430.

So it is not error, in a criminal case, for the trial court to receive relevant evidence, notwithstanding the witness has violated an order of the court to remain outside of the court room while other witnesses were testifying. He may be punished for disobeying a rule of the court, but the state or the defendant should not be deprived of his evidence. *State v. Falk*, 46 Kan. 498.

Any facts tending to prove the main fact, and contemporaneous and connected with it, are admissible as a general rule. All relevant and material evidence must be received; and evidence is not to be rejected because it fails to be conclusive; it is sufficient if it fairly tends to prove a point sought to be established. Testimony in reference to similar transactions is admissible to show

the criminal intent of a party, where other transactions of the same general character and connected therewith are investigated. Am. & Eng. Enc. Law, title *Criminal Procedure*, subdiv. 15. See also *Reg. v. McCarthy*, 2 Car. & K. 379, 1 Den. C. C. 453; *Roscoe*, Crim. Ev. 876; *Reg. v. Weeks*, Leigh & C. 18; *Com. v. Jenkins*, 76 Mass. 485; *Osborne v. People*, 2 Park. Crim. Rep. 583; *Wood v. United States*, 14 U. S. 16 Pet. 360, 10 L. ed. 994; *Rex v. Ellis*, 6 Barn. & C. 145; *Reg. v. Foster*, 2 Eng. L. & Eq. 548; *Reg. v. Cobden*, 3 Fost. & F. 833; *Rex v. Dunn*, 1 Moody, C. C. 146; *Rex v. Davis*, 6 Car. & P. 171; *People v. Rando*, 3 Park. Crim. Rep. 336; *People v. Nichol*, 1 Fost. & F. 51; *People v. Hopson*, 1 Denio, 574.

The declarations of a party to a civil or criminal proceeding, in respect to matters within his own knowledge, or of which he may be presumed to have knowledge, and relevant to the issue, are always competent against him. *Coleman v. People*, 58 N. Y. 555. Evidence is not to be rejected because it fails to be conclusive; it is sufficient if it fairly tends to prove a point sought to be established. *Com. v. Sawtelle*, 141 Mass. 140.

As tending to prove a point sought to be established, the entries of a person since deceased, made at or near the time of a transaction, when he may be presumed to know the facts stated therein, may be read as evidence of the facts stated if it appears that,

- (1) the entry was made in the ordinary course of business; or,
- (2) that it was made in a professional capacity, and in the ordinary course of professional conduct; or,
- (3) that it was made in the performance of a duty imposed by lawful authority. And further
- (4) any act, declaration, or omission of a party against his interest is relevant, and hence admissible.

§ 42. **Offer of Proof.**—Where counsel offer to prove a certain fact and the relevancy of the evidence is not apparent, the court may require him to disclose the substance and on its satisfactorily appearing that it will connect itself legitimately with the question in the case it should be admitted. If it is rejected an exception should be duly entered as in civil cases, and on appeal the materiality of the rejected evidence must be shown. *Morgan v. Browne*, 71 Pa. 130; *Jackson v. Hardin*, 83 Mo. 175; *United States v. Gibert*, 2 Sumn. 20.

“A party having a witness on the stand, may be called upon

by his adversary to state what he proposes to prove, and in that case he must state it. But he need make no such statement unless called upon to do so. It is enough for him to proceed and put his questions to the witness unless desired to state what he expects to prove. It will not be presumed that an improper question will be asked him." But, offers to prove conversations between third persons, tending to implicate the defendant, but not had in his presence, are not admissible as evidence against him, even if they did not relate to the particular offense with which he is charged, they would be inadmissible because irrelevant. *Tolbert v. State*, 87 Ala. 27.

When the admissibility of testimony depends upon the determination of a prior fact by the court, such prior fact need not be established by a weight of evidence amounting to a demonstration. It is only necessary that there should be so much evidence as to make it proper to submit the whole testimony to the jury. *Com. v. Robinson*, 146 Mass. 571.

Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with the intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal. *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com. v. Choate*, 105 Mass. 451; *Swan v. Com.* 104 Pa. 218; *Goersen v. Com.* 99 Pa. 388; *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649; *Mayer v. People*, 80 N. Y. 364. See also *Jordan v. Osgood*, 109 Mass. 457. For cases where such connection was not shown, but where the principle was recognized, see *Com. v. Jackson*, 132 Mass. 16; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *People v. Sharp*, (per Peckham, J.), 107 N. Y. 427.

Where the relevancy of evidence is brought in question, it is the duty of the court to indulge a preliminary examination as to its competency, and this may be conducted in the presence of the jury; but during it they stand simply in the attitude of spectators, with the testimony given them have no concern, it being merely for the information of the court, and until by its ruling some portion of it is presented to the jury as competent evidence in the case, there is nothing to which the defendant may except as constituting legal error. It is within the discretion of the court to

determine how far the examination shall extend. The exercise of that discretion is not reviewable unless it appears that such discretion was abused, and the action of the court arbitrary and unreasonable. *People v. Smith*, 104 N. Y. 491.

Where evidence is received for no specific purpose it is not error to receive it if it is admissible for any purpose. *Starkey's App.* 61 Conn. 199.

All questions of law, including the relevancy of evidence, the determination of such relevancy, the construction of statutes and writings, and of all rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever a fact is assumed to be known to the court, the court is to declare its knowledge to the jury, who are bound to accept it.

§ 43. Indecency no Ground for Excluding Testimony.—Mr. Taylor (§ 867) adopts from Professor Greenleaf the statement that “the law excludes on public grounds * * * evidence which is indecent or offensive to public morals, or injurious of the feelings of third persons.” The authorities given for this are actions on wagers which the court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon *Da Costa v. Jones*, Cowp. 729; Stephen's Digest, art. 2, note 11.

In the recent case of *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733, 735, it was held that the chief element of the offense charged consists in illicit intercourse between the sexes evidence of previous lascivious conduct of the parties is admissible. Abbott's Criminal Brief, citing *People v. Jenesse*, 5 Mich. 305; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Thayer v. Thayer*, 101 Mass. 111; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *State v. Pippin*, 88 N. C. 646; *State v. Kemp*, 87 N. C. 538.

The position taken by Professor Greenleaf on this subject is utterly indefensible, and this condemnation is judicially expressed by Sir James Stephen when he says: “I know of no case in which a fact in issue or relevant to an issue, which the court is bound to try, can be excluded merely because it would pain some one who is a stranger to the action.” Stephen, Dig. (Chase's ed.) art. 2, note 2. Rice, Civil Evidence, § 257.

Judge Thompson very aptly observes: “The fact that evidence is indecent is no objection to its being received, where it is nec-

essary to justice. But it is proper for the trial court to refuse to permit indecent questions to be put to children on the witness stand, nor will the court commit error in refusing to compel a female witness testifying upon an indelicate subject, to couch her answers in indecent language, although, if so expressed, her answer would be more direct though not necessarily more intelligible." Thomp. Trials, § 356. Citing, *inter alia*, *People v. White*, 53 Mich. 537; *State v. Lawton*, 78 N. C. 564.

Evidence, if relevant, is not excluded on account of its indelicacy or indecency. Although courts may not refuse to consider details, however offensive and disgusting, if they become necessary in the course of investigation, yet they should always require the witnesses to be examined in a spirit of due delicacy, avoiding vulgar and obscene language. So a wife, if competent, may prove excessive intercourse; it is public policy which prevents a husband or wife from proving non-access. Stewart, Mar. & Div. § 348, citing *Melvin v. Melvin*, 58 N. H. 569; *DaCosta v. Jones*, Cowp. 729; *Inglis v. Inglis*, 15 Week. Rep. 1093; *Abernathy v. Abernathy*, 8 Fla. 243; *Corson v. Corson*, 44 N. H. 587; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255.

It may be stated in general that the law excludes, on public grounds, evidence which is indecent or offensive to public morals or injurious to the feelings of third persons, the parties themselves having no interest in the matter, except what they have impertinently created. Yet the mere indecency of disclosure does not exclude, where the evidence is necessary for the purpose of civil or criminal justice, as on an indictment for rape, or on a question of sex of one claiming an estate tail, as heir, male or female, or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage or judicial separation, or for damages on the ground of adultery. In these and similar cases the evidence is necessary either for the punishment of crime or for the vindication of rights existing before or independent of the fact sought to be disclosed. Hageman, *Privileged Communications*, § 185, citing 20 & 21 Vict. chap. 85, §§ 16, 27, 33.

NOTE.—A well considered article in 6 Central Law Journal, embodies a discussion of this subject, and while it lacks the weight and influence accorded to a judicial determination it well merits high consideration as a logical presentation of a vexed and subtle distinction, that many courts attempt to sustain in criminal proceedings. The article is based upon and was inspired by the case of *State v. Cowell*, decided by Supreme Court of Nevada in 1878, and reported

In 12 Nev. 337. The writer characterizes this case as the last of a series, "in which judges seem to have striven for the practical overthrow of the well settled rule of criminal law that the evidence must be confined to the issue."

"In this case, as well as in all others of the class to which it belongs, the existence and binding force of that rule is recognized; but the judges demonstrate to their own satisfaction that it is not infringed by the introduction of evidence showing that a prisoner has committed or agreed to commit an offense unconnected with the one for which he is on trial. They shelter themselves behind the rule which forbids the exclusion of evidence, in other respects admissible, merely because it shows, or tends to show, that the prisoner's character is bad, and allows the prosecution, in certain cases, to show that the accused has committed, or agreed to commit a crime other than the one for which he is on trial. They tell us that one of the cases in which this may be allowed, is where such evidence 'tends to throw light on what were the prisoner's motives and intention in doing the act complained of,' and conclude that the evidence decided to be admissible has this tendency.

"Such is the position of the supreme court of Nevada in the case in question. Whether it be correct or incorrect we shall proceed to consider.

"While the writer does not believe that courts should so closely confine the evidence to the particular transaction charged that the ends of justice shall be defeated and the guilty shielded, he is far from believing that they should go to the other extreme.

"The 'safe middle course' should be followed. On the one hand, evidence having a legitimate tendency to show a guilty purpose should not be excluded, and when other crimes committed by the prisoner are so closely connected with the one for which he is on trial that they can justly be said to throw light on his motives in doing the act complained of, evidence of their commission should be allowed to go to the jury. On the other hand, the dictates of justice and humanity require that the prosecution should not be allowed, by showing that the prisoner has committed a wholly disconnected offense, to induce the jury to convict him of a crime which he did not commit, because he deserves punishment for another which he did commit.

"The rule is too well settled to admit of dispute that the commission of one offense cannot be given in evidence on the trial of a person for another, merely for the purpose of inducing the jury to believe that the prisoner committed one offense, because he committed one of the same nature on another occasion.

"After a careful investigation of the subject the writer is forced to conclude that in the case of *State v. Cowell*, this rule was violated.

"What bearing on the question of a man's intent in entering a house has the fact that three days before such entry he agreed with others to rob the owner of the house on the street? Does it show that his intent was to steal? Decidedly not, unless the fact that a man is bad enough to steal tends to show that he entered a house for that purpose. If the evidence of the agreement to rob had no more bearing on the question of intent than this, it should not, as we have already seen, been received. Had it any more bearing? The writer thinks not, and his views are sustained by decisions of undoubted authority."

Here follows a collation of apt authorities beginning with *Kinchelov v. State*, 5 Humph. 9, where it was held that an accomplice could not, with a view to sustain his testimony, be permitted to narrate other instances of crime proposed to him by the defendant, though made in the same conversation in which the

crime charged was proposed. The court in its decision, said: "The only object of such testimony necessarily is to prejudice the minds of a jury, as it can by no possibility establish or elucidate the crime charged. We can well see how a jury who, in the case under consideration, might have unhesitatingly refused to find a verdict against the prisoner upon the evidence of the witness confined within its legitimate scope, may have been misled by the proof of the utter baseness and want of principle as detailed against him."

In *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427, it was held that upon a trial for forgery, the confession of the prisoner that he had committed other forgeries was not admissible on the question of criminal intent.

In *Bonsall v. State*, 35 Ind. 460, it was held that on the trial of the prisoner for a robbery committed on December 16th, it was error to allow the prosecution to show a second robbery of the prosecutor by the prisoner on the following day.

In *People v. Barnes*, 48 Cal. 551, it was held error for the trial court to admit evidence showing that on the night previous to that on which the burglary for which he was on trial was committed, the prisoner entered the prosecutor's room and stole a sum of money.

In *Barton v. State*, 18 Ohio, 221, it was held that upon the trial of the prisoner for stealing a horse, evidence that he had on the night of the day previous to that on which the horse was taken, stolen a sum of money, was inadmissible. In holding that such evidence was not admissible on the question of the prisoner's intent in taking the horse, the court say: "Although the court, in this instance, say that the evidence was only admitted for the purpose of showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions that would enable any legitimate conclusion to be drawn as to that fact. The only conclusion we can see that could fairly be drawn from the evidence, would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief and had just before stolen a sum of money. Each case must be tried on its own merits and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes. On the part of the prosecution the general bad character of the defendant cannot be proved, when he offers no evidence of character; much less can particular acts of his be proved of which the record gives him no notice and which he, therefore, cannot be expected to meet." See also on this point, *Coleman v. People*, 55 N. Y. 81; *People v. Bowen*, 49 Cal. 654; *People v. Jones*, 31 Cal. 565; *Farrer v. State*, 2 Ohio St. 54; *State v. Merrill*, 13 N. C. 269; *State v. Wisdom*, 8 Port. (Ala.) 511.

A resort to the very valuable annotation of section 1, Stephen's Digest by Judge May, will disclose a supplementary discussion of this somewhat confused topic of "Relevancy," but along other lines of investigation than those indicated in the preceding note,—as instance the following:—

There seems to be no general test of relevancy. What is relevant on one issue is not relevant on the other. When the issue is fraud, great latitude is allowed in the proof of circumstances. *Reels v. Knight*, 8 Mart. N. S. 267. Circumstances so trivial and remote in themselves, that, if individually and separately offered, they might justly be rejected, may, from their multitude and relation, become important and obviously relevant. *State v. Watkins*, 9 Conn. 52. Especially, in cross-examination, when it becomes important to show

who and what and how related to the case the witness is or may be, are many questions relevant which otherwise would not be relevant. The decisions of courts of last resort afford no data, and have no such uniformity or similarity as to afford the grounds of a general rule. What they decide to be relevant or irrelevant is or is not so, for the particular case and within their jurisdiction, and to that extent only. A few cases, showing what has and what has not been deemed relevant, will serve to illustrate this remark. It will generally be found that the circumstances of the parties to the suit at the time of the controversy are relevant. On the trial of an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses, or the real principal, evidence is relevant that other persons had received orders from the defendant to do work at the same houses, without showing that the plaintiff knew of those orders at the time he did his work. But if the orders had been to do work upon other houses, it seems they would not have been relevant. *Woodman v. Buchanan*, L. R. 5 Q. B. 585; *Dowling v. Dowling*, 10 Ir. L. Rep. 236. The question being whether A loaned money to B, the fact of A's property at the time of the alleged loan is relevant. *Dowling v. Dowling*, *supra*. The question being to which of two persons the plaintiff gave credit, the facts that he had already before brought suit upon the same demand against one, is relevant, as showing that he did not give credit to the other. *Head v. Taylor*, Litt. Sel. Cas. 258. On proof that the defendant was at a certain place where he might have committed an alleged trespass, it is relevant to show that he was there from another motive than to commit it. *Prindle v. Glover*, 4 Conn. 266; *Tracy McManus*, 58 N. Y. 257. The fact that A usually procured and paid for the board of the workmen in his employ at other boarding houses, is relevant on the question of his indebtedness for the board of those boarding with B. *Dwight v. Brown*, 9 Conn. 83. The question being whether A caused B to miscarry, by violence, the fact that B had several times before miscarried, without violence, is relevant. *Slattery v. People*, 76 Ill. 217. Stephen, Dig. (May's ed.) Chap. 1, art. 1, *note*. For further exposition of this subject see 1 Rice, Civil Evidence, chap. 12.

CHAPTER VIII.

LETTERS.

- § 44. *Present Rules Regarding Letters.*
- 45. *Importance of Letters.*
- 46. *Originals Must be Produced or Accounted for.*
- 47. *Letter-press Copies.*
- 48. *Foundation for Secondary Evidence of Contents.*
- 49. *Views of the Massachusetts Supreme Court.*
- 50. *Mailing Letters Raises the Presumption of Receiving.*
- 51. *Genuineness Must be Shown.*
- 52. *Unanswered Letters.*
- 53. *Failure to Answer as Admission.*
- 54. *Extract from a Lost Letter.*
- 55. *Decoy Letters.*
- 56. *Miscellaneous Authorities.*

§ 44. **Present Rules Regarding Letters.**—Letters as “writing.” A letter is certainly a “writing,” if addressed by one person to another. While we may call it a letter, it is also a writing, whether the characters are made with the pen, by type, or in any other manner. *United States v. Gaylord*, 17 Fed. Rep. 441; *United States v. Britton*, 17 Fed. Rep. 732.

The word “letter” will include the envelope in which it is sent; as, in a notice to produce a letter. *United States v. Duff*, 19 Blatchf. 10.

The postmark on a letter is prima facie evidence that the letter was in the postoffice at the time and place specified. *New Haven County Bank v. Mitchell*, 15 Conn. 206; *Bussard v. Levering*, 19 U. S. 6 Wheat. 102, 5 L. ed. 215; *Lindenberger v. Beall*, 19 U. S. 6 Wheat. 104, 5 L. ed. 216; *Riggs v. Hatch*, 16 Fed. Rep. 838, 842, 850; *Rosenthal v. Walker*, 111 U. S. 193, 28 L. ed. 398; *Montelius v. Atherton*, 6 Colo. 227; *Breed v. First Nat. Bank*, 6 Colo. 235.

If a letter is sent by post, it is presumed from the known course in that department of the public service that it reached its destination at the regular time, and was received by the person to whom it was addressed. *Breed v. First Nat. Bank*, *supra*.

§ 45. **Importance of Letters.**—Letters frequently disclose facts that are well calculated to unfold and develop the nature of a transaction, and they should be admitted as part of the *res gestæ*, notwithstanding they contain declarations in a party's favor. *Beaver v. Taylor*, 68 U. S. 1 Wall. 637, 17 L. ed. 601.

Although a letter contains a statement as to an alleged agreement made after the date when an agreement was made, it is still admissible as part of the *res gestæ*. *McCotter v. Hooker*, 8 N. Y. 497; *Palmer v. First Nat. Bank*, 4 N. Y. Week. Dig. 268; *Jewell v. Jewell*, 42 U. S. 1 How. 219, 232, 11 L. ed. 108, 114; *Com. v. McPike*, 3 Cush. 181, 1 Am. Rep. 727; *Com. v. Hackett*, 2 Allen, 136; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Rawson v. Haigh*, 2 Bing. 99, 104; *Ridley v. Gyde*, 9 Bing. 349; *Rouch v. Great Western R. Co.* 1 Q. B. 51; *Thorndike v. Boston*, 1 Met. 242, 247; *Doe v. Arkwright*, 5 Car. & P. 575.

§ 46. **Originals Must be Produced or Accounted for.**—The mere fact that a party keeps letter-press copies, does not relieve him from the necessity of producing the original, or of laying foundation in the ordinary usual way, for the reception of secondary evidence. *Foot v. Bentley*, 44 N. Y. 171, 4 Am. Rep. 652; *King v. Worthington*, 73 Ill. 161; *Watkins v. Paine*, 57 Ga. 50; *Delaney v. Erickson*, 10 Neb. 492; *Ward v. Beals*, 14 Neb. 114. And in Maryland it is held that, to entitle a party to the introduction of secondary evidence, the opposite party must have been served with a notice to produce the original document; and, further, that some proof must be adduced that this notice was received. *Marsh v. Hand*, 35 Md. 123.

This entire topic is the subject of an extended note appended to the case of the *Oregon S.S. Co. v. Otis*, 14 Abb. N. C. 388, 53 Am. Rep. 221.

§ 47. **Letter-press Copies.**—A sworn copy of a letter-press copy of a lost letter is competent as evidence of the contents of the letter, without producing the letter-press copy. *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469. This is upon the ground that there are no grades of secondary evidence. Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original. If the first copy be lost or in the hands of the opposite party, so long as another may be obtained from the same source, no grounds can

be laid for resorting to evidence of an inferior or secondary character. 3 Waite, Law & Pr. (5th ed.) 444. So when secondary evidence is admissible, parol evidence of the contents of a document is admissible, although there is a copy of the document in evidence. *Doe v. Ross*, 7 Mees. & W. 102, 107; Best, Ev. § 87. But this rule is not universally recognized, and it has in many instances been held that the general rule applies also to secondary evidence, so that a copy of a copy is not evidence, although a copy of the original paper might be, in some cases. See *People v. Riley*, 15 Cal. 48; *Reeve v. Long*, Holt, 286; *Liebman v. Pooley*, 1 Stark. 167; *Everingham v. Roundell*, 2 Mood. & R. 138; *Coman v. State*, 4 Blackf. 241.

But though a press copy is secondary, it may be used as a means of determining the identity and genuineness of an instrument. *Com. v. Jeffries*, 7 Allen, 561, 83 Am. Dec. 712; Whart. Crim. Ev. § 177.

The weight of authority favors the contention that a copy of a letter to the opposite party, cannot be given in evidence when no notice has been given to produce. *Chicago v. Greer*, 76 U. S. 9 Wall. 726, 19 L. ed. 769.

§ 48. Foundation for Secondary Evidence of Contents.—

When it becomes necessary to prove the contents of letters which have passed between parties, the originals must be produced, or the party desiring to give proof of their contents must lay the foundation for secondary evidence in the ordinary and usual way. Letter-press copies are in no sense original papers, and cannot be admitted in evidence without the preliminary proof. *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Marsh v. Hand*, 35 Md. 123. When this proof has been given these copies are admitted as evidence.

§ 49. Views of the Massachusetts Supreme Court.—The Massachusetts supreme court has outlined the prevailing juridical view relative to this subject in an opinion by *Chief Justice Bigelow*. This decision although rendered in 1863, is unimpaired and the logic that originally supported it retains all of its force and vigor. The court admitted press or machine copies of certain letters, purporting to have been written by the defendant, to be read to the jury. These were adjudged competent on two grounds. Independently of proof that the originals were in the handwriting of the defendant, the copies were admissible as documents in his

possession, and to which he had constant access. They therefore furnished room for the inference that he was acquainted with their contents, and affected him with an implied admission of the statements contained in them. This is the ordinary rule of law applicable to papers found in the possession of a party. 1 Greenl. Ev. § 198, and cases cited. Evidence of a precisely similar character was admitted without objection in *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. Nor are we able now to see any valid reason for excluding it.

But upon another and distinct ground the court was of opinion that the evidence was admissible. The press copies, as they are called, were in fact proved to have been in the handwriting of the defendant. They were in truth a part of the original letters as written by him, transferred by a mechanical pressure to other sheets. But such transfer did not destroy the identity of the handwriting as shown on the impression, or render it unrecognizable by persons acquainted with its characteristics. These to a considerable extent it must necessarily still retain, so that a person having adequate knowledge could testify to its genuineness with quite as much accuracy as if he had before him the original sheets, on which the letters were first written. Writings thus transferred are not unlike written documents which have been defaced or partially obliterated by exposure to dampness, rough usage, or the wasting effect of time. Such papers may not possess all the distinctive features of the original handwriting, but their partial destruction or obliteration will not render them inadmissible as evidence, if duly identified by testimony. A press copy, it is true, might furnish a very unsatisfactory standard of comparison by which to determine whether another paper, the handwriting of which was in controversy, was written by the same person, because the mechanical process to which it had been subjected in transferring it would, by spreading the ink and blurring the letters, necessarily somewhat affect its general resemblance. For this reason it was rejected when offered for such purpose in *Com. v. Eastman*, 1 Cush. 217, 48 Am. Dec. 596. But although incompetent as a means of comparison by which to judge of the characteristics of handwriting which is in dispute, it might still retain enough of its original character to be identified by a witness, when its own genuineness was called in question. *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712.

§ 50. **Mailing Letters Raises the Presumption of Receiving.**—Letters placed in designated repositories or delivered to a postman, when duly addressed and stamped, afford prima facie evidence that they were duly received by the addressee. *Oaks v. Weller*, 13 Vt. 106, 38 Am. Dec. 583; *Connecticut v. Bradish*, 14 Mass. 296; *Oregon SS. Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221; *Breed v. First Nat. Bank*, 6 Colo. 235; *Durkee v. Vermont Cent. R. Co.* 29 Vt. 127; *Tanner v. Hughes*, 53 Pa. 289; *Plath v. Minnesota Farmers Mut. F. Ins. Co.* 23 Minn. 479, 23 Am. Rep. 697; *Howley v. Whipple*, 48 N. H. 487; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Scott & Jarnagin*, *Telegraphs*, §§ 340, 341; *Allen*, *Teleg. Cas. passim*; *Rosenthal v. Walker*, 111 U. S. 193, 28 L. ed. 398.

A letter is presumed to reach its destination at the regular time, and to be received by the addressee, if living at the place and usually receiving letters there; as, in cases where notice of the protest of paper is to be sent to an indorser. *Montelius v. Atherton*, 6 Colo. 227.

If a letter offered in evidence purports to be a reply to a letter referred to, the letter must be called for, in order to put in evidence with it. *Harvey v. Pennypacker*, 4 Del. Ch. 454.

§ 51. **Genuineness must be Shown.**—The New York supreme court holds that secondary evidence of the contents of a written instrument, when allowed, does not obviate the necessity of proving the genuineness of the instrument, but renders it more imperative. When secondary evidence of the contents of a writing is admissible, it is indispensable that the person by whom it is proposed to prove it should have seen and read the writing, and can speak from personal knowledge. His having heard another person read it is not sufficient, and a party cannot be charged with notice of the contents of a letter written and sent to him, without proof that it was properly mailed and forwarded to his address. *Dainese v. Allen*, 14 Abb. Pr. N. S. 363.

The placing of a communication in a box used by the party for the deposit of letters creates a presumption that it reached him,—and his denial that he received it raises a conflict of evidence. *Dana v. Kemble*, 19 Pick. 112; *Bluck v. Thorne*, 4 Campb. 192; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

When it is necessary to prove a demand by the introduction of

a letter containing other matter, only that part of the letter which contains the demand can be put in evidence, and if the demand is admitted the letter is properly excluded. *Railway Pass. Assur. Co. v. Warner*, 1 Thomp. & C. addenda, 21.

Where a letter is offered for the purpose of proving a notice contained in it, a general objection is not sufficient, but the inadmissible part must be objected to. *Stokes v. Johnson*, 57 N.Y. 673.

§ 52. **Unanswered Letters.**—The supreme court of Illinois held in a very celebrated case decided in 1887, that an unanswered letter is admissible in evidence against the person who received it and to whom it was addressed, if it appears to have been invited by him, and to have been written in response to some previous communication by him. *Spies v. People*, 122 Ill. 1, subsequently considered in the Supreme Court of the United States, *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80.

§ 53. **Failure to Answer as Admission.**—An omission of one of the parties to a transaction, to answer a letter written to him after the transaction, by the other party thereto, giving the latter's version thereof, may not be taken as an admission to the truth of the statements in the letter; they are mere declarations of the writer in his own behalf, which do not demand an answer, and are not admissible against the party to whom the letter is sent. The mere *ex parte* statements of a party's case cannot be received as evidence simply on the ground that it remains unanswered. *Learned v. Tillotson*, 97 N. Y. 1. Reasons may exist why he may choose and has a right to remain silent and to vindicate himself at some future period and on some more opportune occasion. *Talcott v. Harris*, 93 N. Y. 567.

But when part of an act, declaration, conversation or letter or other writing has been given or read in evidence by one party, so much of the remainder thereof as tends to explain or qualify what has been received may be given or read in evidence by the other. When a letter has been read in evidence, so much of the answer as tends to explain, qualify or deny material parts of the letter may be read in evidence; and when an act, declaration, conversation or writing has been given or read in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given or read in evidence. See *Roe v. Day*, 7 Car. & P. 698; *Gaskill v. Skene*, 14 Q. B. 664.

§ 54. **Extract from a Lost Letter.**—The New York courts hold that an extract from a lost letter is not evidence, unless the witness can testify as to the contents of the whole document. *Walbridge v. Kilpatrick*, 9 Hun, 135.

Where the person to whom the letter is written testifies that he does not know where it is, but believes it has been destroyed, its contents are admissible in evidence. *Green v. Disbrow*, 7 Lans. 381. And it further appears from the decisions that mere possession of letters addressed to one does not render them competent against him. *Willett v. People*, 27 Hun, 469.

In this connection it is well to observe the constant tendency on the part of the courts of last resort throughout this country to admit evidence of any facts which tend to elicit the truth. *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536.

§ 55. **Decoy Letters.**—A decoy letter sent by one engaged in larceny to the porter of a warehouse for the purpose of alluring the latter from his place, is admissible against one who is shown to be connected with such larceny. *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456.

§ 56. **Miscellaneous Authorities.**—Letters written by the president of a bank concerning business of the bank are admissible in evidence against the bank, though written in his individual capacity and though at the time they are offered in evidence his interests are adverse to those of the bank. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498.

On the issue as to actual membership of a firm, letters written by the party sought to be charged as a member, pertaining to the partnership business, are admissible in evidence, although they were written after the transaction as to which he is sought to be charged. *Davenport Woolen Mills Co. v. Neinstedt*, 81 Iowa, 226.

Letters from the mother of an illegitimate child to its nurse may be admitted in evidence for the purpose of showing her assent to the disposition that is being made of the child, and the manner in which it is being provided for, but are incompetent for the purpose of proving paternity. *Re Jessup's Estate*, 6 L. R. A. 594, 81 Cal. 408.

The genuineness of a private letter is not sufficiently proved by the testimony of the receiver that he received it by mail, and that

it is the signature of a certain person, of whose signature he has no knowledge. *Sweeney v. Ten Mile Oil & G. Co.* 130 Pa. 193. And the mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed, which were based on them as genuine, does not qualify the recipient to prove the handwriting of the signer. *Pinkham v. Cockell*, 77 Mich. 265.

The exclusion of a letter written by a third person to an agent, introduced in evidence against the principal, is not error where there is no evidence that the principal authorized the letter to be written. *Hargrove v. John*, 120 Ind. 285.

A copy of a letter cannot be received in evidence over the objection of the first party, unless it is shown that the original is lost or destroyed. *Watson v. Roode*, 30 Neb. 264.

Secondary evidence of the contents of a lost letter is incompetent unless the witness is shown to be acquainted with the handwriting of the alleged writer of the letter. *Bone v. State*, 86 Ga. 108.

Parol evidence is admissible to prove the subject-matter of a letter which cannot be produced on the trial. *Hagan v. Merchants & B. Ins. Co.* 81 Iowa, 321.

A letter written by a third person is inadmissible against a party who is not shown to be bound by its contents. *Zeigler v. Henry*, 77 Mich. 480.

In an action for false imprisonment and malicious prosecution, a letter of the prosecuting attorney authorizing the commencement of the proceedings, tending to show motive and probable cause that an offense has been committed, and that the usual course was taken in such cases, is admissible. *Thurston v. Wright*, 77 Mich. 96.

A party cannot introduce in evidence in his own behalf letters purporting to have been written by him, to show that a contract is as he claims it to be, where there is nothing to show that the one to whom they were written ever received or acted upon them. *Griffith v. Lake* (Tex.) Oct. 28, 1889.

Where letters and postal cards have been put in evidence for the purpose of showing a partnership between defendant and another, he may, for the purpose of showing that some of them related to other matters, put in evidence other letters and postals between the same parties. *Morgan v. Farrel*, 58 Conn. 413.

Upon an indictment for larceny in obtaining goods by means of a false representation or pretense, evidence of other similar transactions at or about the same time is competent as bearing upon the question of intent. Letters written by the prisoner to other dealers, and their replies thereto, and the procuring of the goods by means thereof, are admissible for such purpose, but letters written long after the transaction has taken place are not admissible for any purpose. *People v. Luke*, 27 N. Y. Week. Dig. 51.

CHAPTER IX.

TELEGRAMS.

- § 57. *Rule as to Letters Applied.*
- 58. *Original Message the Primary Evidence.*
- 59. *Views of Different Courts.*
 - a. *Of Illinois Supreme Court.*
 - b. *Of Alabama Supreme Court.*
 - c. *Of the United States Circuit Court.*
- 60. *Presumptions as to Telegrams.*
- 61. *Secondary Evidence of Contents.*

§ 57. **Rules as to Letters Applied.**—The legal intendments that follow and apply to evidentiary facts connected with the introduction of letters as media of proof, suggest the question whether similar intendments are to be indulged with reference to telegrams. The drift of authority gives the affirmative answer. Gray, *Telegraphs*, § 136; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; Whart. Ev. § 76; *State v. Hopkins*, 50 Vt. 316; Scott & Jarnagin, *Telegraphs*, § 345. The presumption indulged in is one of fact, and so open to rebuttal and contradiction, and consists merely in the natural inference which may be drawn from the experienced certainty of transmission. The great bulk of letters sent by mail reach their destination, and equally so the great bulk of telegrams. A failure in either case is an exception, possible, but rare. The letters are transported by government officials under oath, and upon a system framed to secure regularity and precision; telegrams by private corporations, whose success and prosperity depend largely upon the accuracy and promptness of the work, and are faithful under the incentive of interest. These companies perform a public service and are regulated to some extent by the public law. There is impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind with that raised upon delivery to the postoffice, should be deemed weaker in degree, but in view of the wide extension of telegraphic

facilities, and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, it should be held that upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence, or where he is shown to have been, a presumption of fact arises that the telegram reached its destination sufficient at least to put the other party to his denial, and raise an issue to be determined. There is greater safety in conceding the existence of such a presumption of fact under a system like ours, in which the party addressed is always at liberty to testify, and, if dead, his representatives are protected against the evidence of his adversary as to personal transactions and communications. The primary and original evidence of that fact would be the telegram itself, and the handwriting of the sender, or of an agent shown to have been duly authorized; but when it appears that the telegram has been destroyed by the company, secondary evidence of the essential fact may be given. *Howley v. Whipple*, 48 N. H. 487; *Durkee v. Vermont Cent. R. Co.* 29 Vt. 127; *Breed v. First Nat. Bank*, 6 Colo. 235; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395.

§ 58. **Original Message the Primary Evidence.**—It is only on proof excusing its production that a copy of it can be received in evidence or its contents be shown *aliunde*. The rule which is applicable to letters, applies to telegrams affecting contracts. Wharton, Ev. § 76; Scott & Jarnagin, Telegraphs, § 340; *Matteson v. Noyes*, 25 Ill. 591; *Durkee v. Vermont Cent. R. Co.* 29 Vt. 127.

It has been held in *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88, that although secondary evidence of the contents of a telegram is inadmissible without accounting for the absence of the original, yet a new trial will not be granted on account of the irregular admission of such secondary evidence if it appears that the sender himself admitted the sending of the telegram and the contents of it. His omission to deny the sending of the alleged telegrams should have the same effect. *Adams v. Davidson*, 10 N. Y. 309; *Oregon SS. Co. v. Otis*, 14 Abb. N. C. 388, 53 Am. Rep. 221.

Where a party sending a message is the responsible party, and sends a message for the purpose of giving directions to be acted upon, the message delivered at the end of the line is the original.

Morgan v. People, 59 Ill. 58. In *Wilson v. Minneapolis & N. W. R. Co.* 31 Minn. 481, the court says: "It is as though the communication had been made orally by a personal agent, in which case it would have been enough to prove the agency and the message delivered by the agent."

A telegraphic message is not admissible in evidence as a communication of a party offering it without proof of its authenticity. *Burt v. Winona & St. P. R. Co.* 31 Minn. 472.

On an indictment for forgery in a case reported from Vermont, the state's attorney introduced evidence showing that the accused had knowledge of a certain fact. This evidence was in the form of an uncertified copy of a telegram received by a third party, but purporting to have been sent by the accused, making inquiries about the fact in question. The answer to this message which had been received by the accused was also in evidence. It further appears, that the third party testified to the accuracy of the telegram he had sent to the accused, and the state had shown that the original message had been destroyed. The court admitted both telegrams, and the appellate tribunal affirmed the ruling. *State v. Hopkins*, 50 Vt. 316.

§ 59. Views of Different Courts.

a. **Of Illinois Supreme Court.**—The Illinois supreme court has given this matter critical attention and in an early case reached a conclusion that embodies the most logical exposition of the principle underlying both the legal relations of the telegraph company to the general public, and the rules of evidence this familiar relation is held to impose.

It is an elementary principle that resort may always be had to the best evidence within the power of the party, by which the fact is capable of proof. And it is an inflexible rule that if it is in writing, the original must be produced, unless it be shown that it is destroyed, lost, or not within the power of the party to produce it, before secondary evidence can be received of the contents, and before a copy of a written instrument can be admitted, a sufficient foundation must be laid by preliminary proof of destruction or absence. Where no such proof is made to justify the reception of a copy in evidence, it is inadmissible.

We know that, by the admirable system regulating the government of the telegraph companies, the original dispatch is preserved, and may be at all times procured for proper purposes.

The paper filed at the office, from which the message is sent, is of course the original, and that which is received by the person to whom it was sent, purports to be a copy. If the dispatch is sought to be used in evidence, the original must be produced, and its execution be proved, precisely as any other instrument, or its absence accounted for in the same mode, before the copy can be received. *Matteson v. Noyes*, 25 Ill. 591.

b. Of the Alabama Supreme Court.—The supreme court of Alabama, in a recent case, has had this entire subject under critical review. The distinguished *Chief Justice* Brickell, writing for affirmance and voicing the unanimous opinion of the entire court says:

“The general principle is, that a party is bound to produce the best evidence within his power, of which a fact is capable; and that whenever the original of a writing can be produced, secondary evidence of its contents will not be received, and it is as applicable to telegrams as to other writings. There is some difficulty in determining whether the message delivered to a telegraphic office, or that which is delivered to the person to whom it may be addressed at the point of destination, is to be regarded as the original. Perhaps under some circumstances the one or the other may be considered the original. It is not now necessary to enter on that inquiry. If the message as it was delivered to, and may be preserved in the office of the telegraph company at Philadelphia, is to be regarded as the original, it was without the jurisdiction of the court, as was its custodian. It is a settled rule of evidence in this country, that if writings, necessary as evidence in a court of one state, are in the custody of persons residing in another, secondary evidence of their contents will be received.” *American U. Teleg. Co. v. Daughtery*, 89 Ala. 191; *Shorter v. Sheppard*, 33 Ala. 648. And see *Whilden v. Merchants & P. Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1; *Burton v. Driggs*, 87 U. S. 20 Wall. 134, 22 L. ed. 302; *Beattie v. Hilliard*, 55 N. H. 428; *Binney v. Russell*, 109 Mass. 55.

In a note appended to the case of *Whilden v. Merchants & P. Nat. Bank*, *supra*, we find the following suggestive commentary upon the subject under review: “In *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355, it was held that a telegraphic dispatch is not admissible in evidence without proof of the handwriting of the original and of its delivery for transmission. This was an

action to enforce an agreement by telegraph to indorse. The court said: 'The message, sent by Easton, to be transmitted to Chesapeake city, was the original (Scott & Jarnagin, Telegraphs, § 357, and authorities there cited) and not the message which was received over the wires at Chesapeake city. The latter must be considered as a copy, and carries with it none of the qualities of primary evidence. Ordinarily the usual course is to show the delivery of the original message of the party sought to be charged, at the office from which it is to be telegraphed, and then show that it was transmitted and delivered at the place of its destination. But even where the original is produced its authenticity must be established, and this either by proof of the handwriting, or by other proof establishing its genuineness. The destruction of all the messages sent from the office, on the day named, is sufficient foundation for the admissibility of secondary evidence. But this secondary evidence can only be admitted upon proof that the copy offered is a correct transcript of the message actually authorized by the party sought to be affected by its contents.' This is sustained by *Howley v. Whipple*, 48 N. H. 487, and *United States v. Babcock*, 3 Dill. 576. Mr. Abbott (Trial Ev. 290) assents to this where the object is to prove assent or admission, but says the copy delivered is the primary evidence to prove notice to the receiver. *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28. In *Barons v. Brown*, 25 Kan. 410, it is held that where the controversy is not between the sender and the 'person to whom a telegram is addressed, the original message, if not left or destroyed, must be produced.'

c. **Of the United States Circuit Court.**—In a very important case *Judge Dillon* admitted telegrams in evidence, addressed to the defendant by name, care of the Executive Mansion, Washington, D. C., on proof that they were received by the telegraph company in Washington, and delivered to the doorkeepers at the executive mansion, it being shown that the defendant had an office therein as the private secretary of the President, and that the usage of the doorkeepers was to deliver such messages to the persons to whom they were addressed, or place them on their desks. Under such circumstances, telegrams were admitted, without direct proof of their actual delivery to, or actual receipt by the defendant.

The following is from the opinion of the court overruling the

objections of the defendant to the introduction of dispatches purporting to be from the defendant, and to and from McDonald and Joyce:

“We are of the opinion that the objection to the dispatches which have been offered in evidence, based upon the ground that they are not relevant or material, is not well taken. The jury is the constitutional tribunal to determine controverted questions of facts, under appropriate advice from the court to assist them in the discharge of this duty. If the evidence offered tends, in any degree, to establish the existence of any material fact, it cannot be rejected as irrelevant, but must be received and submitted to the consideration of the jury.

“To reject the dispatches offered, on the ground that they were irrelevant and immaterial, would be a decision by the court that such dispatches had nothing to do with the alleged conspiracy, and would take that question, which is a question of fact, from the jury, whose exclusive province it is to decide questions of fact. We do not deem it expedient, or even proper, to remark upon the several dispatches, or to say anything in the presence of the jury calculated to disclose the views of the court as to the force and effect of the several dispatches offered in evidence. It is not to be inferred that, in admitting the dispatches, the court holds that they do or do not connect the defendant with the alleged conspiracy. That is a question for the jury, under advice and direction from the court, which should properly come in the charge or summing up to the jury.

“As to the objection that some of the dispatches addressed to the defendant were unanswered, we are of the opinion that, this alone does not constitute a sufficient ground to exclude them. Such dispatches are to be viewed in connection with all the circumstances of the case, including the nature of the dispatches themselves, as calling for an answer or otherwise, and the situation and relation of the parties, and the effect to be given to the circumstance, that no answers were returned, is to be determined by the jury upon the whole evidence, under the rules of the law to be given in the charge to the jury, bearing upon the subject.

“As to the dispatches between McDonald and Joyce, confessed conspirators, such dispatches are admissible as statements or acts of conspirators among themselves, in furtherance of the conspiracy; but as to the defendant (Babcock) they go for naught,

unless he is shown, by other evidence, to be connected with the conspiracy charged in the indictment." *United States v. Babcock*, 3 Dill. 571.

§ 60. **Presumptions as to Telegrams.**—Proof of the sending of a letter by mail raises the presumption of its receipt by the addressee, and for the same reasons telegrams are now held to be subject to the same rules. *Trotter v. Maclean*, L. R. 13 Ch. Div. 574; *United States v. Babcock*, 3 Dill. 573; *Breed v. First Nat. Bank*, 6 Colo. 235; *Scott & Jarnagin*, *Telegraphs*, §§ 340, 341; *Allen*, *Teleg. Cas. passim*; *Howley v. Whipple*, 48 N. H. 487; *Dunning v. Roberts*, 35 Barb. 471; *Trevor v. Wood*, 36 N. Y. 307; *Durkee v. Vermont Cent. R. Co.* 29 Vt. 127; *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395. The notice to produce is sufficient to authorize the admission of a telegram, although it may have been presumed that the papers called for were in the possession of the telegraph company. *Burton v. Payne*, 2 Car. & P. 520.

By the unqualified indorsement of the United States Supreme Court, the principles announced by the state jurisdictions have received additional commendation as authoritative utterance of the law, and in *Rosenthal v. Walker*, *supra*, Mr. Justice Wood announced the rule in language that places the sentiments of the Federal court beyond cavil, controversy, or question. He says: "The rule is well settled that if a letter properly directed is proved to have been either put into the postoffice or delivered to the postman, it is presumed from the known course of business in the postoffice department, that it reached its destination at the regular time and was received by the person to whom it was addressed. *Saunderson v. Judge*, 2 H. Bl. 509; *Woodcock v. Houldsworth*, 16 Mees. & W. 124; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Callan v. Gaylord*, 3 Watts, 321; *Starr v. Torrey*, 22 N. J. L. 190; *Tanner v. Hughes*, 53 Pa. 289; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Huntley v. Whittier*, 105 Mass. 392, 7 Am. Rep. 536. As was said by Gray, J., in the case last cited: 'The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business, and when it is opposed by evidence that the letters never were received, must be weighed, with all the other circumstances of the case, by the jury, in determining the question whether the letters were actually received or not.'"

§ 61. **Secondary Evidence of Contents.**—As in cases of other writings, proof of the loss of a telegram is a necessary foundation to the admission of parol evidence of its contents. *Whilden v. Merchants & P. Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1. It has been held that the testimony of the operator in charge of the company's office from which a telegram was sent, that he sent away all the papers found there shortly after the telegram was sent, and that he has been informed that they were destroyed, is not competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents. *American U. Teleg. Co. v. Daughtery*, 89 Ala. 191.

This subject is treated generally in connection with the topic of the preceding chapter in 2 Rice, Civil Evidence, 1007-1040.

CHAPTER X.

MEMORANDA IN EVIDENCE.

- § 62. *Prerequisites Necessary to the Introduction of Memoranda.*
- 63. *Time of Making Memoranda.*
- 64. *Memoranda of Party Since Deceased.*
- 65. *Views of the United States Supreme Court.*
- 66. *Views of the Alabama Supreme Court.*
- 67. *Statement of the English Rule.*
- 68. *A Distinction Noted.*
- 69. *Restrictions of the General Rule.*
- 70. *Recent Cases Examined.*
- 71. *The Formula Deduced.*

§ 62. **Prerequisites Necessary to the Introduction of Memoranda.**—It is an indispensable preliminary to the introduction of memoranda in evidence that it should appear in the case that the witness is unable without the aid of the memoranda to speak from memory as to the facts. It is only as auxiliary to, and not as a substitute for the oral testimony of the witness that the writing is admissible. It is the duty of the court in all cases to see, before receiving a memorandum in evidence, that it was made at or about the time of the transaction to which it relates, that its accuracy is duly certified by the oath of the witnesses, and that there is necessity for its introduction on account of the inability of the witness to remember the facts. *Collins v. Rockwood*, 64 How. Pr. 57.

A witness who says that after refreshing his memory by a written memorandum, made by himself at or about the time of the occurrence, he cannot recollect the fact, but that he is confident that he knew the memorandum to be correct when it was made, is not required to swear to the facts in positive terms, but the memorandum itself is received in connection with and as auxiliary to the oral testimony.

§ 63. **Time of Making Memoranda.**—It is well settled that memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the trans-

action, and while it must have been fresh in his memory. The memorandum must have been "presently committed to writing," (Lord Holt in *Sandwell v. Sandwell*, Comb. 445, Holt, 295); "while the occurrences in it were recent and fresh in his recollection," (Lord Ellenborough in *Burrough v. Martin*, 2 Campb. 112); "written contemporaneous with the transaction," (*Chief Justice Tindal in Steinkeller v. Newton*, 9 Car. & P. 313); or "contemporaneously or nearly so with the facts deposed to," *Chief Justice Wilde*, afterwards *Lord Chancellor Truro*, in *Whitfield v. Aland*, 2 Car. & K. 1015. See also *Burton v. Plummer*, 2 Ad. & L. 341, 4 Nev. & M. 315; *Wood v. Cooper*, 1 Car. & K. 645; *Morrison v. Chapin*, 97 Mass. 72-77; *Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 555.

The reason for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum. *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Marclay v. Shults*, 29 N. Y. 346; *State v. Rawls*, 2 Nott. & McC. 331; *O'Neale v. Walton*, 1 Rich. L. 234.

It is an elementary rule that when an entry has been repeated, in the regular course of business, one having been copied from another, at or near the time of the transaction, all the entries are regarded as original.

§ 64. **Memoranda of Party Since Deceased.**—The authorities are unanimous in declaring that memoranda made by a person in the regular course of his employment are competent as evidence after his death and the inclination seems to be to extend this rule so as to include those parties who have passed beyond the jurisdiction of the court or through infirmity or insanity are unable to attend the trial. These assertions find warrant and support in the following cases: *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181; *Philadelphia Bank v. Officer*, 12 Serg. & R. 49; *Augusta v. Windsor*, 19 Me. 317; *Cass v. Bellows*, 31 N. H. 501, 64 Am. Dec. 347; *Whitcher v. McLaughlin*, 115 Mass. 167; *Mayson v. Beazley*, 27 Miss. 106; *Massey v. Allen*, L. R. 13 Ch. Div. 558; *Welsh v. Barrett*, 15 Mass. 380; *Stewart v. Conner*, 9 Ala. 803; *Elliott v. Dycke*, 78 Ala. 150; *Laird v. Campbell*, 100 Pa. 159; *State v. Phair*, 48 Vt. 366; *Porter v. Judson*, 1 Gray,

175; *Costello v. Crowell*, 133 Mass. 352; *Walker v. Curtis*, 116 Mass. 98; *Callaway v. McMillian*, 11 Heisk. 557; *Bland v. Warren*, 65 N. C. 372; *Clemens v. Patton*, 9 Port. (Ala.) 289; *Field v. Boynton*, 33 Ga. 239; *Craft's App.* 42 Conn. 146.

While this general statement of the doctrine is universally accepted, there are some points of difference in its practical application. These differences will be found, upon careful examination, to arise, not from any doubt as to the general principle itself, but from a certain want of uniformity in the local law of the various states in respect to the nature of the quantum of preliminary proof.

§ 65. **Views of the United States Supreme Court.**—The high consideration which attaches to any decision of the United States Supreme Court naturally invests its utterances with great interest and imposes a certain degree of respect upon the most assertive and unconventional tribunal. In a very recent case the topic now under treatment received the attention of that court, and a decision was reached that will doubtless go far to quiet the controversy upon this subject. The court, *Mr. Justice Gray* writing the opinion, holds that a memorandum in writing, of a transaction which occurred twenty months before its date, and which the person who made the memorandum testifies that he had no recollection of, but knows it took place because the memorandum so states, and because his habit was never to sign a statement unless it was true, cannot be read in aid of his testimony. *Parsons v. Wilkinson*, 113 U. S. 656, 28 L. ed. 1037.

Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326–337, 5 L. ed. 628–630; *Ætna Ins. Co. v. Weide*, 76 U. S. 9 Wall. 677, 19 L. ed. 810; *Republic Fire Ins. Co. v. Weide*, 81 U. S. 14 Wall. 375, 20 L. ed. 894; *Chaffee v. United States*, 85 U. S. 18 Wall. 516, 21 L. ed. 908.

§ 66. **Views of the Alabama Supreme Court.**—The present status of this entire subject has the benefit of a discriminating and logical review from *Mr. Justice Stone* of the Alabama supreme court. As it would be difficult to frame in language a more elucidative statement, we append the decision in full.

“The law recognizes the right of a witness to consult memoranda in aid of his recollection, under two conditions: First, when after examining a memorandum made by himself, or known

or recognized by him as stating the facts truly, his memory is thereby so refreshed that he can testify, as matter of independent recollection, to facts pertinent to the issue. In cases of this class, the witness testifies to what he asserts are facts within his own knowledge; and the only distinguishing difference between testimony thus given, and ordinary evidence of facts, is that the witness by invoking the assistance of the memorandum, admits that without such assistance his recollection of the transaction he testifies to had become more or less obscured. In cases falling within this class, the memorandum is not thereby made evidence in the cause, and its contents are not made known to the jury, unless opposing counsel call out same on cross-examination. This he may do for the purpose of testing its sufficiency to revive a fading or faded recollection, if for no other reason.

"In the second class are embraced cases in which the witness cannot testify to an existing knowledge of the fact, independent of the memorandum; in other words, cases in which the memorandum fails to refresh and revive the recollection, and thus constitute its present knowledge. If the evidence of knowledge proceed no further than this, neither the memorandum nor the testimony of the witness can go before the jury. If, however the witness go further, and testify that at or about the time the memorandum was made, he knew its contents, and knew them to be true, this legalizes and lets in both the testimony of the witness and the memorandum. The two are the equivalent of a present positive statement of the witness affirming the truth of the contents of the memorandum." *Acklen v. Hickman*, 60 Ala. 568.

In order to refresh the recollection of the witness it is not important that the paper, book or memorandum should have been written or printed by himself, or that it should be an original writing. It is sufficient that he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection. *Chapin v. Lapham*, 20 Pick. 467. See *Coffin v. Vincent*, 12 Cush. 98; *Kensington v. Inglis*, 8 East, 273; *Rex v. Dutchess of Kingston*, 29 How. St. Tr. 619; *Burton v. Plummer*, 2 Ad. & El. 341; *Huff v. Bennett*, 6 N. Y. 337. In *Horne v. M'Kenzie*, 6 Clark & F. 728, a surveyor was called to refresh his memory by an extract

from his field notes, embodied in a printed note made by him, and verified by him as correct.

§ 67. **Statement of the English Rule.**—"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction, concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was then fresh in his memory.

"The witness may also refer to any such writing made by any person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

"An expert may refresh his memory by reference to professional treatises." Stephen, Dig. art. 136.

§ 68. **A Distinction Noted.**—A distinction which it is of the utmost importance to observe is this: In all instances where the witness has a clear and accurate recollection of the fact it is sought to show by the written memoranda—has a vivid recollection of all facts independent of the memoranda—the latter must be excluded from all consideration. It is not admissible as a medium of evidence, and must not be introduced. *Corning v. Ashley*, 4 Denio, 354; *Peck v. Von Keller*, 76 N. Y. 604; *Dunn v. James*, 62 How. Pr. 307.

The importance of emphasizing this distinction is illustrated in a recent case in the general term of the fourth department of the New York supreme court. The action was for goods sold and delivered, the answer alleged payment; on the trial the defendant stated: "I remember distinctly paying this money, I was perfectly sure I had paid it without looking at my memorandum." Just here was developed the difficulty that led to the reversal of the case, and where the subtlety of the distinction sought to be emphasized is best illustrated. The defendant swears to a distinct recollection of paying, independent of the written memorandum which he produced and read from, under the objection of counsel. The objection was to the incompetency of the written memorandum, it appearing that the witness could distinctly recall the fact without it—that his recollection of the transaction which resulted in the payment of the claim was vivid and abiding, and that he was in no wise dependent for the least assistance upon the writing. *Collins v. Rockwood*, 64 How. Pr. 57.

In *Marchy v. Shults*, 29 N. Y. 346, the same rule was approved,

and it was held that a memorandum was incompetent because, in the language of *Judge Mullin*, "it was not intimated by the witness that he did not remember the fact without reference to the memorandum." And at page 335 of the same case, *Judge Denio* reaffirms the same rule.

The absence of harmony in the various state decisions as to the legal status of the writing itself admonishes us to indicate a further distinction which should constantly be borne in mind. This distinction relates to the varying degrees of credence given to the original memorandum, and a copy of it. Those jurisdictions which still adhere to the exclusionary principles of the early common law decisions are inclined to a very discourteous reception of a principle which has found great favor in other states. To introduce into one cause a copy of a paper the truth of the copy must be first established and a proper foundation laid for its introduction, (*Smith v. Carrington*, 8 U. S. 4 Cranch, 65, 2 L. ed. 551; *Catlin v. Underhill*, 4 McLean, 199) but after such foundation is laid, the memorandum itself may be introduced and it is abundantly established by authority that such evidence is competent. *Pembroke v. Allenstown*, 41 N. H. 365; *Guy v. Mead*, 22 N. Y. 462; *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Ætna Ins. Co. v. Weide*, 76 U. S. 9 Wall. 677, 19 L. ed. 810. See also *Moots v. State*, 21 Ohio St. 653.

§ 69. **Restrictions on the General Rule.**—There is some conflict in the authorities regarding the rules as to the admission of memoranda as evidence, and we find an unfortunate disposition in some jurisdictions among jurists of acknowledged eminence to uphold the principle engrafted upon the Scottish law, and approved by Lord Tenterden, to exclude from consideration all memoranda not in the handwriting of the witness. This refinement must be clearly apprehended. The doctrine was asserted and declared in the early years of the common law, and has been a pet theory with the Scottish jurists, who have continued to assert it with unbroken force from the earliest time.

"The law is a practical science and repudiates subtle refinements and speculative inquiry. It will not sacrifice substantial rights to impracticable processes, but will reject them to make way for practical justice. Recondite discussion of 'efficient cause,' 'plurality of causes,' and cognate topic are for the metaphysician and the speculative philosopher, not for the practical

lawyer or judge. There are doubtless instances where the reasoning which supports the rule excluding the memoranda of a stranger from evidence operates in a beneficial way, but those instances merely illustrate the force of that glib phrase 'hard cases make bad law.'" Tait, Ev. § 133.

A legal maxim originating in the dark ages has been the prolific source of this contrariety of view, and is directly responsible for the sluggish attitude of some courts upon this subject of memoranda.

Where memoranda of disputed items covering ten years, made by a decedent on a loose slip of paper, found in his desk after death, without proof that they were original items, or when made, or that it was his custom to make charges in this manner, are not admissible as evidence of an indebtedness to the decedent. *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565.

While the peculiar situation disclosed by previous evidence had given this case an exceptional status in the law of evidence, still we can detect the presence of a restrictive tendency on the part of the court, in the matter of memoranda as evidence. The court says: "There was error in admitting the exhibit as evidence, and the error cannot be regarded as a harmless one. The jury might and probably did consider the account, as it appeared on that exhibit, of the same value, as evidence, as they would any other account that Elijah Barber might have kept against the defendant; and their verdict, under the charge of the court, may have been predicated upon that evidence." *Lapham v. Kelly*, 35 Vt. 195; *Cross v. Bartholomew*, 42 Vt. 206; *Goddling v. Orcutt*, 44 Vt. 54; *Barber v. Bennett*, 58 Vt. 476, 56 Am. Rep. 565.

§ 70. **Recent Cases Examined.**—It would contravene the most obvious principles of justice, were a party allowed to produce memorandum evidence without submitting it to the inspection of the opposite party. The law guards with exceptional caution every avenue that leads to forgery or imposition. *Merrill v. Ithica & O. R. Co.* 16 Wend. 600, 30 Am. Dec. 130. A correlative right follows as of course to cross-examine with reference to the memoranda.

The practitioner is referred for further elucidation upon this subject of inspection to a Vermont case, where the matter was a subject of a carefully prepared opinion which has been cited repeatedly with every symptom of approval. See *State v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616.

The court says: "An entry or memorandum made by the witness himself, at or near the time of the transaction in question and before it has in any degree faded from his memory, which is full and complete, so as naturally to suggest and aid the mind in recalling what really transpired, is a strong ground of reliance and belief. It would, therefore, seem that it is a legitimate subject of inquiry and examination with reference to a witness referring to entries on the stand for the purpose of refreshing his recollection, whether the memorandum thus used and referred to really does assist his memory or not. That must depend in some measure upon its character, and that can be ascertained only by inspection and cross-examination in respect to it, and when and by whom made, its appearance, genuineness, fullness and faithfulness. . . . 'It is always usual,' says Phillips (1 Phil. Ev. p. 289), 'and very reasonable, when a witness speaks from memoranda, that the counsel should have an opportunity of looking at them when he is cross-examining the witness;' and Starkie (1 Starkie, Ev. p. 179) asserts the same doctrine. He remarks: 'The witness may be cross-examined as to other parts of the entry.' If the document be produced the opposite counsel is entitled to cross-examine from it. See also part 1, Cowen & Hill's notes (2d ed.) 757; *Rex v. Ramsden*, 2 Car. & P. 603. The view as presented by these authorities is alone consistent with the party's right to cross-examine the witness upon whose credibility the question in issue somewhat depends, and which, it is said, constitutes a 'strong test, both of the ability and willingness of the witness to declare the truth.' In no other way can his accuracy and recollection be ascertained and tested, which in all cases are proper matters of inquiry with a view to weighing his evidence, and the range of inquiry is open to this extent. And a witness cannot deprive a party of this right, or shield himself from the obligation of disclosing the whole truth to this end, or refuse the production and examination of a memorandum which is in court, and upon which he relies and to which he refers for the reason disclosed by this case; certainly not, unless it appears to the court that he had a reasonable ground of belief that he would subject himself to personal injury in consequence of producing and allowing an examination of it."

Mr. Justice Andrews, in *Peck v. Valentine*, 94 N. Y. 569, characterizes this right to inspect the document and cross-examine

the witness as one of great importance, and a substantial safeguard and protection against fabricated evidence. To the same effect are the following decisions: *Peck v. Lake*, 3 Lans. 136; *Chute v. State*, 19 Minn. 271; *Duncan v. Seeley*, 34 Mich. 369; *Stanwood v. McLellan*, 48 Me. 275; *Tibbitts v. Sternberg*, 66 Barb. 201; *McKivitt v. Cone*, 30 Iowa, 455; *Dugan v. Mahoney*, 11 Allen, 573; *Costello v. Crowell*, 133 Mass. 352; *Adae v. Zangs*, 41 Iowa, 536; *Davis v. Field*, 56 Vt. 426; *Burgess v. Bennett*, 20 Week. Rep. 720.

When a witness produces a memorandum, and testifies that he made it in the usual course of business, and that he knew at the time its contents were true, his testimony and the memorandum are both admissible as evidence; and if the person who made the memorandum or entries in books is dead, they are admissible as evidence on proof of his handwriting, and of the fact that they were made in the usual course of business, at or about the time of the transaction to which they relate. *Hancock v. Kelly*, 81 Ala. 368.

A witness may be allowed to refresh his memory by referring to memoranda made by himself, relating to numbers, dates, sales and deliveries of goods, payments and receipts of money, accounts and the like, in respect to which no memory could be expected to be sufficiently retentive without depending upon memoranda. *Wernwag v. Chicago & A. R. Co.* 20 Mo. App. 473; *Howard v. McDonough*, 77 N. Y. 592.

To render a memorandum admissible as evidence, the witness must be able to testify that he knew its contents when it was made and knew them to be true; it must have been made at or near the time of the occurrence or transaction to which it relates, and the original must be produced, or its absence accounted for. But a witness may refresh his memory by reference to a memorandum made at or about the time of the occurrence to which it relates, when he knows it to be correct, and after refreshing his memory, can testify from independent recollection; and he may use a copy which he knows to be correct without producing the original; in which case, the memorandum is not admissible as evidence unless called for by the adverse party, nor can a copy be used if the original is in court. *Stoudenmire v. Harper*, 81 Ala. 242.

A witness will be permitted to refresh his memory by an examination of the memoranda reasonably contemporaneous with the

transaction to which they relate, regarding dates, figures, results of calculation and the like. *Friendly v. Lee*, 20 Or. 202.

A witness may be permitted to refresh his memory by reference to bank book entries and by inspection of stubs of checks, where such entries were made by those having charge of the books, in the usual and ordinary course of the business in which the witness was at the time engaged and with the conduct of which he was familiar, and were examined by him and found correct and were calculated only to render accurate and definite that which was otherwise in a manner shown to be true by his evidence. *Third Nat. Bank v. Owen*, 101 Mo. 558.

A reporter for a commercial agency who visited a certain person for the purpose of getting a statement of his financial condition and who has made a copy of his statement, may in testifying as to representations made by such person refresh his memory from the copy, but where he does not remember the figures given him by such person but only that he went to him and procured a statement he cannot read the copy in evidence. *Caldwell v. Bowen*, 80 Mich. 382.

An almanac may be received in evidence, to refresh the memory of the jury as to the time the moon rises or sets. *Case v. Perew*, 46 Hun, 57.

If a witness swears that he made an entry or memorandum in accordance with the truth of the matter as he knew it to exist at the time of the occurrence, such entry or memorandum is admissible in evidence in confirmation of what the witness states from memory. *Owens v. State*, 67 Md. 307.

A witness cannot refresh his memory from an affidavit previously sworn to and subscribed by him *ex parte*, unless it be shown that the affidavit was written by him or under his direction at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew the same were correctly stated in his affidavit. *Morris v. Lachman*, 68 Cal. 109.

A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids, and if the witness has an independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum. *State v. Baldwin*, 36 Kan. 3.

The copy of a writing, as well as the original may be referred to by the witness, if his memory, refreshed thereby, enables him to testify of his own recollection of the original facts, independent of his confidence in the accuracy of the copy. But he is not in such case to read from the copy. *Bonnet v. Glattfeldt*, 120 Ill. 166.

A witness in fixing the date of a transaction may refer to a book or diary and the entries therein, but the book or diary may not be produced for the inspection of the jury. *First Nat. Bank of Dubois v. First Nat. Bank of Williamsport*, 114 Pa. 1.

The supreme judicial court of Massachusetts in a well considered case, held that a newspaper reporter who had made specific memoranda of certain alleged facts, and had frequently woven the data so obtained in a newspaper article, which had been printed, might examine the printed report for the purpose of assisting his recollection. It was not contended that the written or printed report could be put in evidence. *Com. v. Ford*, 130 Mass. 64, 39 Am. Rep. 436.

The Georgia supreme court seems to have adopted a most liberal view of the subject, and admits a memorandum in evidence, on the ground that it is a part of the *res gestæ*, and is further competent as corroborating the memory of the witness. The memorandum is regarded as a memorial made at the time of what transpired in a form more durable and less liable to mistake than mere human memory. *Reviere v. Powell*, 61 Ga. 30, 34 Am. Rep. 94. This decision exhausts the logic of the case, and it is to be regretted that it is not of wider acceptance.

The rule is no doubt well settled that a witness for the purpose of refreshing his memory may use any memorandum made at the time of a transaction in regard to which he is called upon to testify, whether made by himself or another, and when his memory has been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. *Bigelow v. Hall*, 91 N. Y. 145.

There seems to be two classes of cases on this subject. Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection; and where the witness, after referring to the memorandum, undertakes to swear to the fact, yet, not because he remembers it, but because of his confidence in the cor-

rectness of the memorandum. In both cases the oath of the witness is the primary, substantive evidence relied upon. In the former, the oath being grounded upon actual recollection, and in the latter on the faith imposed in the verity of the memorandum, in which case, in order to judge of the credibility of the oath and the reliance to be placed upon the testimony of the witness, the memorandum must be original and contemporary, and produced in court. *Davis v. Field*, 56 Vt. 426.

A witness having no recollection of the details of a fact claimed to have occurred in the course of the routine of his official business, may testify to the uniform routine, and that the details of this transaction must have been in accordance with that routine or habit. *Abbott*, Trial Brief, § 394, citing *Morrow v. Ostrander*, 13 Hun, 219; *People v. Oyer & Terminer*, 83 N. Y. 436, aff'g *People v. Genet*, 19 Hun, 91.

A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates, but it is only when the memory needs assistance that resort may be had to these aids, and if the witness has any independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum. *State v. Baldwin*, 36 Kan. 3.

Of similar tenor are the New York cases which uniformly hold that a memorandum may be read in evidence, if made at the time and by the witness who made them. *Halsey v. Sinsebaugh*, 15 N. Y. 487. It is competent to read an entry made by a witness, or a witness may use one made by another, if he can testify then from recollection to the fact to which the entry relates. He cannot refer to an entry not original, and to one not made at or near the time. *Marchly v. Shults*, 29 N. Y. 346; *Guy v. Mead*, 22 N. Y. 462; *Russell v. Hudson River R. Co.* 17 N. Y. 134; *Odell v. Montross*, 68 N. Y. 499. The fact that the memorandum was made by the witness should be proven with a degree of certainty which leaves no room for doubt. *Gilchrist v. Brooklyn Grocers Mfg. Asso.* 59 N. Y. 499.

§ 71. The Formula Deduced.—The formula deducible from the authorities is this: "It is competent to read an entry made by a witness, of any fact material to the issue, if made at or near the time when the fact occurred, and he can swear that it was made correctly (*Guy v. Mead*, *supra*); or may use an entry made

by himself or by any other person, or a copy of an entry, if on reading it he can testify that he then recollects the fact to which the entry relates." *Marchy v. Shults, supra.*

A witness may be allowed to refresh his memory respecting an issuable fact by any writing or other material thing offered in court for his inspection, if after such inspection the witness can testify to the fact.

A witness may be allowed to refresh his memory by referring to a writing made by himself or examined by him when the facts were fresh in his mind and he knew the writing to be correct, although he has no independent recollection of the facts sought to be elicited aside from the writing. If the witness has no recollection aside from the writing, the original writing, if made by the witness, may be received in evidence. In either case the writing must be produced and may be examined by the adverse party, who may, if he chooses, cross-examine the witness upon it and may read it to the court and jury.

Generally on this topic it may be found useful to refer to the following authorities as sustaining the rule established in the foregoing text. *Lightner v. Wike*, 4 Serg. & R. 203; *Calvert v. Fitzgerald*, Litt. Sel. Cas. 388; *Lawrence v. Barker*, 5 Wend. 305; *Redden v. Spruance*, 4 Harr. (Del.) 267; *Field v. Thompson*, 119 Mass. 151; *Russell v. Hudson River R. Co.* 17 N. Y. 140; *Guy v. Mead*, 22 N. Y. 465; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 586, 30 Am. Dec. 130; *Kelsea v. Fletcher*, 48 N. H. 283; *Haven v. Wendell*, 11 N. H. 112; *Mims v. Sturdevant*, 36 Ala. 640; *State v. Rawls*, 2 Nott. & McC. 331-334; *Luby v. Hudson River R. Co.* 17 N. Y. 131; *Pennsylvania R. Co. v. Brooks*, 57 Pa. 343; *Dietrich v. Baltimore & H. S. R. Co.* 58 Md. 347-355; *Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 282; *Chicago, B. & Q. R. Co. v. Riddle*, 60 Ill. 535; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 351; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 266; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 446; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 30; *Bellevue R. Co. v. Hunter*, 33 Ind. 354, 5 Am. Rep. 201; *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 556, and *note*, 41 Am. Rep. 333; *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 630; *Roberts v. Burks*, Litt. Sel. Cas. 411; *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 636, 36 Am. Rep. 825.

See also 2 Rice, Civil Evidence, chap. 20.

CHAPTER XI.

PROOF OF HANDWRITING.

§ 72. *How and By Whom Proved.*

73. *Rule as to Proof by Comparison in Different States.*

a. *Rule in Vermont.*

b. *Rule in Massachusetts.*

c. *Rule in New York.*

d. *Rule in Alabama, Ohio and South Carolina.*

74. *Miscellaneous Authorities Examined.*

75. *Views of Mr. Wills.*

§ 72. **How and By Whom Proved.**—The law points out two modes of proving private writings, in order to enable the parties to use them as evidence. First, when a witness has seen letters or documents purporting to be in the handwriting of the party, and having afterward personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts, it is sufficient to enable the witness to give evidence in relation to the handwriting of the party to the instrument sought to be used in evidence. *Woodford v. McClenahan*, 9 Ill. 89. The other mode is, by a witness who has seen the party write, and if the witness has seen the party write but once, he is competent to prove the handwriting. 1 Greenl. Ev. § 577; *Woodford v. McClenahan*, *supra*. But the handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine, either by a witness, or by the court or jury. 1 Phil. Ev. 490; *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *Mauri v. Heffernan*, 13 Johns. 58; *Titford v. Knott*, 2 Johns. Cas. 211; Haines, Justices of Peace, p. 683. Substantially the same rule in statutory form finds appropriate expression in the following language:

“The handwriting of a person may be proved by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired knowledge of his handwriting. Evidence respecting the handwriting may also be given by

a comparison made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such by persons having an interest in knowing the fact." *Neal v. Neal*, 58 Cal. 287; *Cartery's Estate*, 56 Cal. 470. And see Cal. Code Civ. Proc. §§ 1943, 1944.

As discriminating a textwriter as Mr. Phillips, referring to proving handwriting, by the evidence of third persons—as not inferior to that of the party himself, says: "Such evidence is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired by precisely the same means, as the knowledge of other persons, who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true." 1 Phil. Ev. (6th ed.) 212; Roscoe, Crim. Ev. p. 5.

§ 73. Rule as to Proof by Comparison in Different States.

a. **Rule in Vermont.**—In Vermont the signature of a party may be proved to be genuine or false by a comparison of it with another genuine signature. *Butler v. Dixon* (Chittenden County, 1832, not reported), cited in 21 Vt. 264; *Gifford v. Ford*, 5 Vt. 532; *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *State v. Horn*, 43 Vt. 20; *State v. Hopkins*, 50 Vt. 316; *Sanderson v. Osgood*, 52 Vt. 309. The signature with which the comparison is made, before it can be used, should be established as a genuine one. As stated in *Adams v. Field*, *supra*, its genuineness "must either be admitted or established by clear, direct, and positive testimony." Unless this is in the first instance done, the testimony should, for obvious reasons, be excluded. *Rowell v. Fuller*, 59 Vt. 684.

b. **Rule in Massachusetts.**—The question came before the court in Massachusetts in *Com. v. Coe*, 115 Mass. 504, where it was held that, before a writing can be used as a standard of com-

parison of handwriting, it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and that the question of its admissibility as a standard is to be determined by the judge presiding at the trial; and, so far as this decision is of a question of fact merely, it is final, if there is any proper evidence to support it; and that exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principle of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. The same question has very recently been before the court in Vermont, in the case of *Rowell v. Fuller*, 59 Vt. 688, where the court reviewing the decisions, there says that the question has not before been authoritatively decided in that state, and lays down this rule, that when a writing is disputed, and another is offered in proof as a standard, the court should first find as a fact that the latter is genuine and then submit it to the jury in comparison with that in controversy. The doctrine is enunciated in *Com. v. Coe*, *supra*, which is the same as that so recently settled in Vermont, has since been re-affirmed in *Costello v. Crowell*, 133 Mass. 352, and again in *Costello v. Crowell*, 139 Mass. 590. The rule in England is now the same as in Massachusetts and Vermont. For centuries, however, it was otherwise, and the English courts denied the admissibility of such testimony altogether until 1854, when parliament, by 17 & 18 Victoria, chap. 125, passed what is known as "The Common Law Procedure Act," which affiliates the law with that prevailing in the last mentioned states.

c. Rule in New York.—The most appropriate legislation relating to this topic that has engrossed the attention of bench and bar, is contained in the recitals of chapter 36 of the Laws of 1880, as enacted by the legislature of the state of New York. Much of the confusion and uncertainty that infests this topic would disappear under the influence of a congressional enactment of the same scope and character.

This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules.

The act in question leaves the character, number and sufficiency

of identification of the specimens offered in evidence for the purposes of comparison entirely to the discretion of the court, and thus attempts to obviate the objections formerly existing to this species of evidence.

The language of the act, however, which permits the introduction of specimens of a person's handwriting, for the purpose of comparison, when proved to the satisfaction of the court, authorizes only the admission of such writings as purport to be the handwriting of the person, the genuineness of whose signature is disputed. The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder as those of the person purporting to have executed the instrument in controversy. Any other construction would place it within the power of a contestant to introduce in evidence specimens of the handwriting of as many persons as he should see fit to charge with the act of forging the signature in dispute.

d. Rule in Alabama, Ohio and South Carolina.—Persons who are acquainted with, or have some knowledge of another's handwriting, whether acquired by having seen the party write, or other legal way, are competent to testify and give an opinion as to the genuineness of the signature. Experts may go further, and institute a comparison between writings admitted to be genuine and those disputed, and give an opinion. A witness need not be familiar with another's handwriting, to render him competent; on the other hand, not every person who has seen another write is competent to testify, or give an opinion upon the genuineness of the signature. In the course of a busy life, one may see many persons write, in many instances merely casually, the recollection of which is entirely effaced from the memory, as much so as if he had never seen the writing. In such cases, the witness is not competent to give an opinion, merely because he may remember, or it may be shown, that he has seen the person write. Not being an expert, in order to make a witness competent to give an opinion as to the genuineness of a writing, he must be able to say that he has some knowledge or acquaintance with the handwriting of the person, or believes he has such knowledge or acquaintance, acquired by seeing him write many times, or once, or in some other legal way. The extent of his knowledge or familiarity with the handwriting in question enters into the weight of his testimony, but does not affect its competency.

In the case of *State v. Givens*, 5 Ala. 754, it was declared, that "a witness required to testify upon the subject, must possess a previous knowledge, acquired by having seen the party write, or in some other legal manner."

In the case of *Hopper v. Ashley*, 15 Ala. 465, the witness answered, "that he had seen the plaintiff write once, but he did not know his handwriting." The court informed the witness "that he was not required to swear positively as to the writing, but if, from having seen the plaintiff write once or oftener, he believed he was acquainted with his handwriting, or would recognize it, then he was competent, and bound to give his opinion." Here the witness was held incompetent.

The case of *Moon v. Crowder*, 72 Ala. 88, does not militate against these authorities. The declaration "that a witness who has seen the party write may express his opinion," referred to the facts of the case which appeared in the record, though not reported in the opinion, and which tended to prove a previous knowledge of the handwriting, acquired by having seen the party write. The more recent case of *Griffin v. State*, 90 Ala. 596, fully declared the same rule, as to the competency of a witness to give an opinion upon handwriting.

The fact that the witnesses saw the defendant write is enough to carry his testimony as to the genuineness of the signature to the jury, they to give it such weight as they think it entitled to. Besides, the witness had corresponded with the defendant and received letters from him. But if the admission of the evidence was erroneous it did no harm, since the genuineness of the same signature was proved by Andrew Froitzheim, Jr., whose competency was abundantly shown. *People v. Petmecky*, 2 N. Y. Crim. Rep. 450.

A person may, by and through a correspondence with another, become so well acquainted with his handwriting as to be competent to testify as to the genuineness of a writing claimed to be his. *Abbott*, Trial Ev. 393; *Roscoe*, Crim. Ev. 174, 175; 1 Greenl. Ev. § 577; *Rogers v. Ritter*, 79 U. S. 12 Wall. 317, 20 L. ed. 417.

A witness who shows himself to be acquainted with another's handwriting may, before or at the trial, refer to papers in his possession which he knows to be in the handwriting of the other, to refresh his memory before testifying. *Abbott*, Trial Ev. 395; *Redford v. Peggy*, 6 Rand. (Va.) 316; *Smith v. Walton*, 8 Gill, 77; *McNair v. Com.* 26 Pa. 388.

It is a well settled rule in Ohio that, where the genuineness of handwriting is involved, well attested standards of the hand of the person whose writing is in question may be introduced for the purpose of comparison with that which is disputed; and that this comparison may be made, not only by persons who have seen the party write, or have acquired a knowledge of his hand by corresponding or transacting business with him, but also by persons skilled in handwriting, such as are usually called experts. *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Calkins v. State*, 14 Ohio St. 222.

The rule established in South Carolina is that while comparison of handwriting is inadmissible as an original means of ascertaining the genuineness of a signature or other writing, yet it may be admitted in aid of doubtful proof. *State v. Ezekiel*, 33 S. C. 115.

§ 74. **Miscellaneous Authorities Examined.**—A witness whose knowledge of a party's handwriting has been obtained by seeing him write for the purpose of showing his true manner of writing to the witness, with a view to his testifying, will not be permitted to testify his belief as to the genuineness of the signature in question. *Reese v. Reese*, 90 Pa. 89, 35 Am. Rep. 634, quoting Lord Kenyon's saying in *Stranger v. Searle*, 1 Esp. 14: "The defendant might write differently from his common mode of writing his name, through design."

In *King v. Donahue*, 110 Mass. 155, 14 Am. Rep. 589, where a general rule in relation to standards of comparison by the jury much less strict than in other jurisdictions, it was held that a party was not entitled to write her signature in the presence of the jury for the purpose of its being compared with a signature purporting to be hers in evidence, the genuineness of which she denied. It was said: "The rule however seems to be that a signature made for the occasion, *post litem motam*, and for use at the trial, ought not to be taken as a standard of genuineness, and that the jury should not be troubled with the additional issue or question whether the signature so offered is written in a constrained and forced manner or not."

The common law rule in England and several of the states does not allow the proof of handwriting by comparison of hands as liberally as in Maine, Massachusetts and Connecticut, (*Moore v. United States*, 91 U. S. 273, 23 L. ed. 347) yet it has always been

the practice in these states to introduce other writings, admitted or proved to be genuine, whether relative to the issue or not, for the purpose of comparison of the handwriting. The object is to enable the court and jury, by an examination and comparison of the standard with the writing in controversy, to determine whether the latter is or is not genuine. *Hammond's Case*, 2 Me. 35, 11 Am. Dec. 39; *Chandler v. LeBarron*, 45 Me. 536; *Woodman v. Dana*, 52 Me. 13; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Richardson v. Newcomb*, 21 Pick. 315; *Lyons v. Lyman*, 9 Conn. 55.

"For this purpose," observes the court in *Woodman v. Dana*, *supra*, "the specimens of handwriting, not otherwise pertinent to the issue, but admitted and proved to be genuine, may be introduced before the court and jury, as a standard for comparison by which to test the genuineness of the writing in controversy, for this purpose such standard specimens may be compared by experts in the presence of the jury, and such experts are permitted to express an opinion as to the fact whether the controverted paper be genuine or not, founded upon such comparison." *State v. Thompson*, 80 Me. 194.

It is not allowable, upon an issue as to handwriting, to put in evidence papers, otherwise irrelevant, merely for the purpose of enabling the jury to institute a comparison of the writing. The statute of the state of New York, permitting a comparison of writings for the purpose of determining handwriting, has no effect upon criminal proceedings in the courts of the United States. In those courts the extent of the rule is to permit the jury to compare writings lawfully in evidence for some other purpose. It has never been permitted to introduce writings for the mere purpose of enabling the jury to institute a comparison of writings. To permit the practice here sought to be established would be to permit the defendant to make evidence for himself. *United States v. Jones*, 10 Fed. Rep. 469.

In *Bronner v. Loomis*, 14 Hun, 341, the action was on a promissory note claimed by the plaintiff to have been made by the defendant, who interposed the defense that her signature thereto was a forgery. The defendant was examined as a witness in her own behalf, and on her cross-examination she, at the request of the plaintiff, wrote her name on a slip of paper which was received in evidence on the plaintiff's offer and over the

defendant's objection, and it was held to be competent evidence. The inquiry was, whether the signature in question was or was not that of the witness who had testified on the direct examination that it was not. In *Chandler v. De Barron*, 45 Me. 534, it was held that a writing made in the presence of a court and jury by the party whose signature is in dispute, may be submitted to the jury for the purpose of comparison.

In some jurisdictions without statute, and in New York and Iowa by recent statute, any writing proved to the satisfaction of the court, or admitted to be genuine, may be used as a standard of comparison; the opinions of experts may be taken on the comparison, and the standards may be submitted for inspection and comparison by the jury. *Abbott*, Trial Brief, § 437, citing *Tyler v. Todd*, 36 Conn. 218; *Burdick v. Hunt*, 43 Ind. 381; *Macomber v. Scott*, 10 Kan. 335; *Com. v. Andrews*, 143 Mass. 23; *State v. Thompson*, 80 Me. 194; *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331; *Wilson v. Beauchamp*, 50 Miss. 24; *Yeomans v. Petty*, 40 N. J. Eq. 495; *State v. Hastings*, 53 N. H. 453; *Bell v. Brewster*, 44 Ohio St. 690; *Travis v. Brown*, 43 Pa. 9; *Smyth v. Caswell*, 67 Tex. 567; *Kennedy v. Upshaw*, 64 Tex. 411; *Durnell v. Sowden*, 5 Utah, 216; *Adams v. Field*, 21 Vt. 256; *Rowell v. Fuller*, 59 Vt. 688; N. Y. Laws 1880, chap. 36; Iowa Code, § 3655; *State v. Calkins*, 73 Iowa, 128.

A writing known to be in the handwriting of a party may be introduced for the purpose of comparison. *Georgia M. M. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Chance v. Indianapolis & W. G. R. Co.* 32 Ind. 472; *Macomber v. Scott*, 10 Kan. 336; *Page v. Homans*, 14 Me. 478; *Sweetser v. Lowell*, 33 Me. 446; *Vinton v. Peck*, 14 Mich. 295; *Yates v. Yates*, 76 N. C. 143; *Murphy v. Hagerman*, Wright, 293; *McCorkle v. Binns*, 5 Binn. 340; *State v. Hopkins*, 50 Vt. 316; *Bird v. Miller*, 1 McMull. L. 123.

§ 75. **Views of Mr. Wills.**—"Evidence of similitude of handwriting by the comparison of controverted writing with the admitted or proved writing of the party, made by a witness who has never seen the party write, nor has any knowledge of his handwriting, and who arrives at the inference that it is his handwriting because it is like some other which is so, is a mode of proof which has been much lauded by writers on the civil law, and is commonly admitted in those countries whose jurisprudence is founded on that system; the comparison being made by pro-

fessional experts appointed by the court or agreed upon by the parties, under many restrictions for securing the genuineness of the writings which are to form the standard of comparison. Comparison of handwriting appears also to be a recognized mode of proof in some of the American states, whose judicial systems are generally founded on our own. Such evidence is in general inadmissible in this country, though the leaning of text-writers of authority appears to have been rather in favor of the principle of its admissibility; the only admitted exceptions are where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is in ancient writing. In these excepted cases, the evidence is admitted, it is said, of necessity, in the former case because it is not possible to prevent the jury from making such comparison, and therefore it is best, as was remarked by Lord Denman, for the court to enter with the jury into that inquiry, and do the best it can under circumstances which cannot be helped; in the latter, because from the lapse of time no living person can have any knowledge of the handwriting from his own observation, and because in ancient documents it often becomes a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches." Wills, Circ. Ev. pp. 132-134.

For further review of this subject see 1 Rice, Civil Evidence, chap. 9.

CHAPTER XII.

PAROL EVIDENCE.

§ 76. *Its Extended Relations to Criminal Cases Illustrated.*

77. *Statutory Instances of Its Relevancy.*

78. *Must in all Instances be Direct.*

79. *Competent in Cases of Lost Instruments.*

§ 76. **Its Extended Relations to Criminal Cases Illustrated.**

—The extended treatment accorded this subject, of best, secondary and parol evidence, in volume 1, of *Rice on Civil Evidence*, is sufficient warranty for the extreme brevity of the treatment here. A reduplication of the views there expressed, is quite impossible through considerations of space alone, and it is doubtful if the author could improve the exposition there given, within the same limits.

As regards the topic of parol evidence, its obvious implications with nearly every caption of this volume, are sufficiently suggestive to prevent any attempt to minimize the subject by circumscribing the statement of its applications to the few paragraphs that usually form the text of a chapter. Certainly, when we consider that parol or oral evidence is competent to prove any fact whatever (*Stephen, Dig. Ev. § 61*) it would seem permissible under the peculiar circumstances of the case, to treat the topic under the various sub-headings to which it naturally belongs, and to which the practitioner would naturally refer, rather than attempt the colligation of its myriad applications, for the purpose merely of scattering them again throughout the text of the entire volume.

As illustrative of our position, parol evidence naturally associates with (1) the examination of witnesses; (2) the impeachment of witnesses; (3) proof of handwriting; (4) relevancy; (5) *res gestæ*; (6) expert and opinion evidence, and with defensive and inculpatory proof in all of its endless diversities. Its competency under nearly every branch of our subject is avowedly or by implication admitted by jurists and textwriters indiscriminately and with the aid of an exceptional index the practitioner can readily

turn to the minutest detail of the subject or to any sub-heading and find the affinities of this particular branch of the science, elaborated and explained. This will sufficiently account for the absence of an extended chapter dedicated to the needs of the subject.

The treatment of parol evidence is synonymous with the treatment of criminal evidence. "Every fact except (speaking generally) the contents of a document must be proved by oral evidence." Indeed a modern writer has recently placed before the profession a work of exceptional merit and rare discrimination, that vindicates the averments of the text. Professor Browne has given the elucidations of this subject in one of the most scholarly and comprehensive legal compositions that have solicited the favorable attention of the bench and bar for many years. I cordially recommend the attentive perusal of his work, as a complete vindication of the views of the present author.

§ 77. **Statutory Instances of Its Relevancy.**—Returning from this brief digression it may be expedient to illustrate the extreme breadth and ramification of this subject, by a transcript of section 1870, of the California Code of Civil Procedure. While it is not claimed that this statutory regulation has any extra-territorial effect, it is insisted that its wide acceptance as a correct exposé of modern rules admitting this species of evidence, are but one of its many titles to recognition, while it may be profitably added that it recently met with the cordial indorsement of the very able commission, appointed by the legislature of New York to draft and report a code of evidence, with a view to its ultimate enactment as statutory law.

Any fragment or brochure in the form of a legal screed, that can meet with the critical approval of such eminent jurists as David Dudley Field, David L. Follett and William Rumsey, is liable to be as nearly perfect as the present writer has any expectation of making an independent statement of his own. This fact is certainly another title to recognition.

The section in question relates to facts which may be proved in criminal prosecutions by parol evidence and are tabulated in the following form:

1. The precise fact in dispute;
2. The act, declaration, or omission of a party, as evidence against such party;

3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;

4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of joint owner, joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;

7. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission, is evidence, as part of the transaction;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has the knowledge of a person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage to explain the true character of an act, contract, or instrument, where such character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family Bibles, or other fam-

ily books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts are presumed or logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section 1847.

§ 78. **Must in all Instances be Direct.**—Oral evidence must in all cases be direct.

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who said he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Stephen, Dig. § 62.

§ 79. **Competent in Cases of Lost Instruments.**—If an original writing has been lost, proof of the loss must first be made, before parol evidence can be given of its contents. Upon such proof being made, together with proof of the execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by oral evidence. See Best and Secondary Evidence, *ante*, chap. 5.

The extreme importance of this subject has induced elaborate consideration in 1 Rice, Civil Evidence, chap. 8. The treatment extends beyond 80 sub-divisions of that chapter, and is believed to faithfully reflect the juridical sentiment of this country upon this topic.

CHAPTER XIII.

RES GESTÆ.

- § 80. *Statement and Illustration of the Principle.*
 - a. *Difficulty in Determining What Is.*
 - b. *Views of Mr. Rapalje.*
 - c. *The General Rule.*
- 81. *What Evidence is Competent in Proof of.*
 - a. *The Rule in Roscoe.*
- 82. *Perplexing Nature of the Proof of.*
- 83. *Three Leading Cases Examined.*
 - a. *Pennsylvania Case.*
 - b. *Michigan Case.*
 - c. *A New York Case.*

§ 80. **Statement and Illustration of the Principle.**—There is a principle in the law of evidence which is known as “*res gestæ*,” that is, that the declarations of the individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. To make declarations on this ground admissible, they must have not been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction.

The general rule is that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction. See *Hanover R. Co. v. Coyle*, 55 Pa. 396; *Lund v. Tyngsborough*, 9 Cush. 36; *Com. v. Hackett*, 2 Allen, 136.

In the case last cited a witness testified that, at the moment the fatal stabs were given, he heard the victim cry out “I am stabbed,”

and he at once went to him and reached him within twenty seconds after that, and then heard him say, "I am stabbed; I am gone; Dan Hackett has stabbed me." This evidence was held competent as part of the *res gestæ*. Bigelow, *Ch. J.*, speaking of this evidence, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed instantly, after the stab with the knife had been inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporary with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*." The learned judge also said that the rule which renders *res gestæ* competent has been often loosely administered by courts of justice so as to admit evidence of a dangerous and doubtful character; and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony; and that that court was disposed to apply the rule strictly, and to exclude everything which did not clearly come within its just and proper limitations.

It may therefore be laid down as the established doctrine that, as to all facts in evidence properly constituting part of the *res gestæ*, they are to be considered by the jury, in passing upon the question of guilt or innocence, whether introduced by the prosecutor or the defendant. *Hill v. People*, 1 Colo. 452; *State v. Porter*, 34 Iowa, 140; *Roscoe*, Crim. Ev. (7th ed.) 135.

In *Maher v. People*, 10 Mich. 217, 81 Am. Dec. 781, it is held that in criminal prosecutions the whole of the *res gestæ* should be before the jury, so as to show the real nature, state of mind, and intention with which the act was done; that the object of the trial should be to show the real nature of the whole transaction, whether its tendency be to establish guilt or innocence. It is there

suggested that any inference drawn from a detached portion of an entire transaction may be entirely false. In *Wellar v. People*, 30 Mich. 20, the court held it to be the duty of the prosecutor in cases of homicide to call those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, unless, possibly, where too numerous. In *Hurd v. People*, 25 Mich. 406, attention was called to a fact often overlooked by courts as well as prosecuting officers, that "a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony." *Kent v. People*, 8 Colo. 563.

Evidence of exclamations, groans and screams is now permitted more upon the ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way.

It characterizes and explains such condition. True such condition might be simulated, but this possibility is not strong enough to outweigh the propriety of permitting such evidence as fair, natural and original and corroborative evidence of the plaintiff, as to his then physical condition. Its weight and propriety are not therefore now sustained upon the old idea of the necessity of the case. But evidence of simple declarations of a party made some time after the injury and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency while the former necessity for its admission has wholly ceased.

As is said by Judge Allen in *Reed v. New York Cent. R. Co.* 45 N. Y. 575, the necessity for giving such declarations in evidence where the party is living and can be sworn no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. With the rules as herein announced there can be no fear of a dearth of evidence as to the extent of the injury and the suffering caused thereby. The party can himself be a witness if living, and if dead, the suffering is of no moment, and the exclamations of pain, the groans, the signs, the screams can still be admitted. But we are quite clear that the

bold statement made long after the injury by the party that he suffers from pain ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain. *Roche v. Brooklyn C. & N. R. Co.* 105 N. Y. 294, 59 Am. Rep. 506.

a. Difficulty in Determining what is.—It is not easy always to determine when declarations may be received as part of the *res gestæ*, and the cases upon this subject in this country and in England are not always in harmony. The cases of *Com. v. McPike*, 3 Cush. 181, 1 Am. Rep. 727, and *Travelers Ins. Co. of Chicago v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437, are extreme cases upon one side, and would justify the reception of the declarations in the last paragraph. The case of *Reg. v. Bedingfield*, 14 Cox, C. C. 341, is an extreme case upon the other side, and goes much further than would be needed to justify the exclusion of these declarations. That case was decided by Lord Chief Justice Cockburn, after consulting with Field and Manisty, JJ., and aroused much discussion and criticism in England. *Bedingfield's Case*, 14 Am. L. Rev. 817, 15 Am. L. Rev. 71. The rule as to *res gestæ* laid down in *Com. v. McPike*, *supra*, has since been limited, and very properly applied in other cases.

b. Views of Mr. Rapalje.—When it becomes necessary to inquire into the nature of a particular act, or the intention of the person who did it, proof of what he said at the time is admissible for the purpose of showing the true character of the act; but to render such declaration competent, the act with which it is connected should be pertinent to the issue; for when the act is *per se* incompetent, the union of the two will not render the declaration admissible. *Brumley v. State*, 21 Tex. App. 222, 57 Am. Rep. 612; *State v. Belcher*, 13 S. C. 459; *State v. Horton*, 33 La. Ann. 289; *Lander v. People*, 104 Ill. 248; *Hunter v. State*, 40 N. J. L. 495; *Mack v. State*, 48 Wis. 271. The true test of the admissibility of such testimony is, that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony. *Lander v. People*, *supra*; *Foster v. State*, 8 Tex. App. 248; Rapalje, Crim. Proc. 243.

c. The General Rule.—The general rule as to *res gestæ* is that all declarations made at the same time the main fact under consideration takes place, and which are so connected with it as

to illustrate its character, are admissible as original evidence, being what is termed a part of the *res gestæ*, in other words, a part of the thing done. The cries of the bystanders while the thing is being done are original, and not hearsay evidence, because they are part of the *res gestæ*, but a defendant may not manufacture evidence for himself, either before or after or in the moment of the assault, and claim its admission under this head, and in no just sense can words spoken several moments before or after the event be considered a part of the thing done. *Territory v. Yarberry*, 2 New Mex. 391.

The *res gestæ* consists of two parts,—the accompanying acts and the declarations attending them. The rule is, as we have seen, that the whole transaction may be given in evidence. But it is impossible to deduce, from the authorities, an available rule as to what shall be deemed of the transaction, and what shall not. The subsidiary act need not transpire at the same instant with the main one, or always even on the same day; and, in reason, as well as in accordance with the current of the authorities, the time which divides the two is not the controlling consideration, though it may be taken into the account. Is it presumable that, distinctly and palpably, it influenced or was influenced by the main act, or proceeded from the same motive? If so, it is admissible, otherwise not. Such is the doctrine in reason; and, it is submitted, the current of authority is, at least, not adverse. Bishop, *Crim. Proc.* § 1085.

§ 81. **What Evidence is Competent in Proof of.**—When a declaration, act or omission forms part of a transaction which is a fact in issue relevant to the issue, such declaration, act or omission is relevant if it tends to explain or to show the purpose or character of the transaction. This is equivalent to holding that evidence of occurrences at or about the time the crime is committed, is admissible as part of the *res gestæ*. *Com. v. Harwood*, 4 Gray, 41, 64 Am. Dec. 49; *Schnecker v. People*, 88 N. Y. 192; 3 Russell, *Crimes* (9th ed.) 288; *Coleman v. People*, 58 N. Y. 555, affirming 1 Hun, 396; *Pontius v. People*, 21 Hun, 328, affirmed in 82 N. Y. 339; *Hope v. People*, 83 N. Y. 418; *Shipply v. People*, 86 N. Y. 375; *Walters v. People*, 6 Park. *Crim. Rep.* 15; *Rex v. Ellis*, 6 Barn. & C. 145; 2 Russell, *Crimes*, 287, 288; 2 Colby, *Crim. Law*, 192; *Jordan v. State*, 22 Ga. 545.

The rule of the *res gestæ* admits declarations made under the

impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it. *Abbott, Trial Brief*, § 628. So what a by-stander says during an occurrence, and in the presence of the actors, is competent as part of the *res gestæ*. *Baker v. Gausin*, 76 Ind. 317; *Wood v. State*, 92 Ind. 269. It must certainly be regarded that, in criminal trials, the conduct of the accused at or about the time the offense is alleged to have been committed, and at or about the time of the arrest, may go in evidence to the jury as one means of establishing the fact and extent of the defendant's guilt. This species of evidence has been so often received that we will not undertake to cite the numerous authorities. See *Johnson v. State*, 17 Ala. 624; *Martin v. State*, 28 Ala. 81.

a. **The Rule in Roscoe.**—It is said in Roscoe's Criminal Evidence, p. 115, that "not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person when scrutinized by those who suspect him." While this is an authority enjoining on courts and jury the duty of exercising great caution in receiving and weighing such evidence, it is nevertheless a direct authority for receiving evidence of the conduct, demeanor and expressions of the accused. *Liles v. State*, 30 Ala. 24.

The true rule is, that all acts and facts upon which any reasonable presumption of the truth or falsity of the issue can be founded, may be given in evidence; but such acts or facts must precede or be part of the *res gestæ*, and, unless as confessions or given for the purpose of explanation or qualification, the subsequent acts and statements of the party are never admissible. The acts and declarations of the prisoner given in evidence in his favor ought to be connected, both in point of subject-matter and of time, with the acts or declarations proved against him. *Roscoe, Crim. Ev.* 88; *Dillin v. People*, 8 Mich. 357.

What is said and done by persons during the time they are engaged in a riot constitutes the *res gestæ*, and it is, of course, competent to prove all that is said and done. If the violent or disorderly conduct of the rioters results in injury to property, and the act causing the injury is committed during the riot, the state may prove the act which caused the injury. This evidence is not admitted for the purpose of establishing another offense, but be-

cause it is a part of the occurrence which constitutes the riot and tends to show that the conduct of the defendant was riotous and violent. *Gallagher v. State*, 101 Ind. 411.

§ 82. **Perplexing Nature of the Proof of.**—In a recent New Jersey case, *Chief Justice* Beasley, in referring to this subject, says: “I think I may safely say that there are few problems involved in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestæ*. The adjudications on the subject, more especially those in this country, are perplexingly variant and discordant. I can readily find judicial rulings by force of which this testimony would be excluded; but I can as readily find other rulings of equal weight, that would sanction its admission. This result has grown out of the difficulty of applying, with anything like precision, general rules to a class of cases of infinite variety. In the well considered case of *Lund v. Tyngsborough*, 9 Cush. 42, it is said: ‘The *res gestæ* are different in different cases, and it is, perhaps, not possible to frame any definition which would embrace all the various cases which may arise in practice. It is for the judicial mind to determine upon such principles and tests as are established by the law of evidence, what facts and circumstances in particular cases come within the import of the terms. In some instances, the test indicated will be found in the rule that such declarations are admissible, because they are so connected with an act, itself admissible as part of the *res gestæ*, as to have become incorporated with it. The declaration and the act must make up one transaction. The theory justifying this course is that, when such declarations are thus coupled with a probable act they receive confirmation from it; but if they stand alone, without such support, they depend altogether for their credence on the veracity of the utterer, and thus conditioned, they are pure hearsay, and inadmissible.’ Alluding to the rule that excludes hearsay, Mr. Starkie, 1 Stark. Ev. p. 65, says: ‘The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstance in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made.’” *Hunter v. State*, 40 N. J. L. 495.

§ 83. Three Leading Cases Examined.

a. **A Pennsylvania Case.**—A recent Pennsylvania case which

came before the supreme court on appeal will best illustrate the present attitude of the American judiciary upon this very important phase of evidentiary law. The extract which is here reproduced will disclose its relations with our subject and sustain the positions of the text. The court says :

“The principal witness for the commonwealth testified to the prisoner’s participation in the homicide, and the circumstances connected therewith. Among other things, she stated that immediately after the murder was committed and the money divided, one of the parties concerned therein scraped some of the blood from the floor into a piece of red earthen crock, emptied it at the east end of the house, so that the people would think the Kintzlers were killed outside and would not look for their remains in the house, and then threw the crock over the top of the appletree into the adjoining woods. It was proved by several witnesses that blood was found next morning where Mary Hartley said it had been emptied, and, in further corroboration of her testimony, the witness was permitted to testify, under exception, that in August, 1880, he, in company with other persons, made search in the edge of the woods, where Mary Hartley said the piece of crock was thrown, and there, among the leaves and stones, found several pieces; in the language of the witness, ‘quite a number among the rotten leaves and dirt. There are small roots grown over parts of the pieces, wire roots.’ He also testified that he tried some of the pieces, and they fitted together, thus indicating that they were parts of a larger piece, corresponding in kind with that alleged to have been thrown away on the night of the murder. This may appear to be a trifling circumstance, but in view of the fact that throughout the trial, the credibility of Mary Hartley was assailed as unworthy of belief, on the ground that, according to her own showing, she was an accomplice, it was not improper to corroborate her statement as to the *res gestæ*. She had been corroborated as to other circumstances, but it was urged, as a special objection to the admission of the testimony complained of, that so long a time had elapsed before the pieces of crock were found. In reply to this, the learned judge properly remarked that he could not say, ‘as matter of law, that it was too remote to be received in evidence.’ The fact that the place where the pieces of crock were found was secluded, lessened the probability of their having been placed there by any other agency than that

testified to by Mary Hartley; and the further fact that they were covered with leaf mould, and wire roots had grown over them, indicated that they had probably lain there from the time the murder was committed. In connection with other facts and circumstances in the case, we cannot say it was improper to receive and submit the testimony to the jury. As corroborative evidence, it may have been very slight, but still it was not incompetent." *Moyer v. Com.* 98 Pa. 338.

b. **A Michigan Case.**—The prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestæ*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. It is the *res gestæ*, or whole transaction, the burden of proving which rests upon the prosecution, so far at least as the evidence is attainable. It is that which constitutes the prosecutor's case, and as to which the defendant has the right of cross-examination; it is that, which the jury are entitled to have before them, and, "until this is shown, it is difficult to see how any legitimate inference of guilt, or of the degree of the offense, can be drawn."

The prosecutor in a criminal case, is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then, to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence, that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is, "to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence." The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community. And, according to the well established rules of the

English courts, all the witnesses present at the transaction, should be called by the prosecution, before the prisoner is put to his defense, if such witnesses be present, or clearly attainable. See *Maher v. People*, 10 Mich. 225, 81 Am. Dec. 781. The English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be the near relatives of the prisoner. See *Reg. v. Chapman*, 8 Car. & P. 559; *Reg. v. Orchard*, 8 Car. & P. 565, *note*; Roscoe, Crim. Ev. 164. Doubtless, where the number present has been very great, the production of a part of them might be dispensed with, after so many had been sworn as to lead to the inference that the rest would be merely cumulative, and where there is no ground to suspect an intent to conceal a part of the transaction.

c. A New York Case.—In a recent criminal case decided by the New York court of appeals, the late *Chief Justice* Folger, writing for affirmance and voicing the prevailing opinion of that distinguished court, took occasion to commit the appellate bench to some very radical conclusions upon this subject of *res gestæ*. The case arose under an indictment for grand larceny, and the defendant in error offered to prove what was said as to the mode of obtaining the property, by the men of whom he alleged that he had bought it at the time of the alleged purchase. His honor says:

"It was doubtless hearsay, and was not competent testimony to prove that the alleged vendors came by the property in the mode asserted. But as it was competent for the defendant to prove the acts by which the goods came into his possession, if he was able to, it was competent to prove all pertinent sayings and doings that then were made and done, as relevant upon the issue of guilty knowledge. It was competent. It was for the jury still to say whether it was of weight in showing the prisoner innocent in the transaction, if they found that the transaction took place as he testified. *Rex v. Whitehead*, 1 Car. & P. 67; *Powell v. Harper*, 5 Car. & P. 590; *Hayslip v. Gymer*, 1 Ad. & El. 162. The cases to the contrary, cited from 3 Park. Crim. Rep., *People v. Rando*, p. 335, and *Wills v. People*, p. 473, were doubtfully decided. On principle, such evidence must be competent. It is the rule, generally speaking, that declarations accompanying acts are admissible in evidence as showing the nature, character and object of such acts. 1 Stark. Ev. 51, 87. The direct proof of

knowledge of the larceny, is not needed to convict of receiving stolen goods with guilty knowledge. That knowledge may be gathered from the circumstances of the case, of which one is the buying the goods at an under valuation. 1 Halstead, Dig. Ev. 619; 2 East, P. C. chap. 16, p. 765, § 153. If the circumstances of the case and such buying are proof tending to show guilty knowledge, then whatever that is relevant, that was said at the time of the buying, is a part of the *res gestæ*, and competent to explain the act. And see *Reg. v. Wood*, 1 Fost. & F. 497; 1 Phil. Ev. (7th ed.) 234. Of course, the jury are not bound to believe either that the statements, if made, were true, or that the prisoner believed them to be true and was moved by them, or that they were in fact made to him. Like all other testimony, it is to be given to them for what it is worth, and it is for them to give to it the value it deserves. *People v. Dowling*, 84 N. Y. 478.

The defendant is entitled to the admission of evidence of a conversation tending to exculpate him and forming part of the *res gestæ*. *People v. DeGraff*, 6 N. Y. S. R. 412.

The rules expressive of the prevailing views upon this subject of *res gestæ*, are fully stated in 1 Rice, Civil Evidence, section 212, chapter 10, p. 375. If desirable to pursue the topic in detail, the practitioner is referred to that part of this undertaking.

CHAPTER XIV.

HEARSAY EVIDENCE.

- § 84. *Rule in Civil Cases Applied.*
- 85. *General Rule Excluding.*
- 86. *Exceptions Noted by a Prominent Text Writer.*
- 87. *When the Rule in Civil Cases does not Apply.*
- 88. *The Rule from Roscoe.*

The subject of hearsay evidence will be accorded very meagre treatment in this immediate connection. The thoroughness with which the entire topic was canvassed in chapter 10 of volume 1 of *Evidence in Civil Cases* obviates all necessity for further notice. Nothing can be added to the exposition already given, and considerations of space alone will preclude any attempt at a duplication of the views previously expressed, through nearly 70 pages of the chapter referred to.

§ 84. **Rule in Civil Cases Applied.**—The same exclusionary rules which are observed in civil cases relative to the introduction of this peculiar grade of evidence, obtain with equal force in criminal cases; and the same exception which public policy and the obvious demands of justice have engrafted upon these exclusionary rules by which hearsay evidence is, under proper conditions, admissible, obtains equally in criminal as in civil cases. No legal proposition that we can state has received more extensive endorsement than that which accords to the rule of evidence the same force and pertinency in criminal as in civil cases. Clearly, if the object of all evidence is the ascertainment and development of truth, the regulations and formulas which are supposed to assist in its development should not be placed in a condition of estrangement merely because the fact to be developed arises in different forms of action.

§ 85. **General Rule Excluding.**—Hearsay evidence is inadmissible, to establish any specific fact capable of direct proof by witnesses, speaking from their own knowledge, and when the rule is relaxed, it is from necessity alone. *Overstreet v. State*, 3 How. (Miss.) 328; *Wooster v. State*, 55 Ala. 221.

After such an inveterate and universal acceptance of a rule acknowledged to be of great practical importance and frequent application, it must be considered that the time has passed for testing its correctness by the criterion of speculation. If such a rule of evidence, after so conspicuous and protracted an existence, is to be pushed aside, or even is to be considered as liable to challenge on theoretic grounds, it is difficult to divine upon what stable basis the administration of the law is to be conducted. *Graves v. State*, 45 N. J. L. 203.

There is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. There are, however, certain instances where hearsay evidence is admissible, because either the objection does not apply, or from the necessity of the case the rule is relaxed.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. And, generally speaking, declarations accompanying acts are admissible in evidence as showing the nature, character, and objects of such acts. 2 Russell, Crimes, § 3.

In 2 Best, Ev. § 506, under the head of "*Res inter alios acta*," it is said: "No person is to be affected by the words or acts of others, unless he is connected with them, either personally or by those whom he represents, or by whom he is represented." *State v. Beaudet*, 53 Conn. 536, 55 Am. Rep. 155.

§ 86. Exceptions Noted by a Prominent Text Writer.—

Hearsay (derivative, or secondhand, as opposed to secondary) evidence is that which is learnt from some one else, whether by word of mouth or otherwise; in other words, it is anything which does not derive its value solely from the credit given to the witness himself, but which rests also, in part on the veracity and competence of some other person.

Harris well known Treatise on Criminal Law tabulates eight exceptions to the rule rejecting hearsay evidence.

The reasons usually assigned for the rejection of hearsay evidence are two: (a) that the original statement or writing was not made an oath; (b) that the party affected has not the opportunity of cross-examining the originator of it. Its reception would also have the effect of lengthening the proceedings, without any corresponding advantage. We have seen that secondary evidence can be given only where there has been an explanation of the absence of the best evidence; secondhand evidence cannot be given at all, subject to the following exceptions:

1. To prove the death of a person beyond the sea.
2. To prove a prescription, a custom, matters of pedigree, reputation on questions of public or general right.
3. When the hearsay is what the witness has been heard to say at another time, in order to invalidate or confirm his testimony given in court. [This is not hearsay. The evidence is direct and primary that the witness made a certain statement; there is no evidence, in such case, either direct or hearsay, as to the truth of the matter contained in the statement.]
4. Declarations made by persons under the sensible conviction of their impending death. Such declarations are admitted only when the death of the deceased is the subject of the charge (that is, in cases of murder or manslaughter) and only if the declaration refers to the injury which is the cause of death.
5. Statements made by deceased persons, if against their interest, or entries made by them in the regular course of their duty or employment.
6. When the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible as original evidence; for example, what was said to a surgeon immediately after an assault.
7. When the sayings, etc., of another are part of the *res gestæ*, that is, of the general transaction, and are not merely a medium of proof of another fact. Thus the cries of a person being stabbed, in a mob, are good evidence. In fact, these are not strictly instances of hearsay evidence at all, but the original proofs of what took place.
8. Evidence, in the second trial, of testimony given by a witness now deceased, at a former trial of the same case between the same parties.

It will be convenient here to notice the rule that if a witness is dead, or too ill to travel (or kept out of the way, as against the person so keeping him out) his depositions may be read provided that such depositions were taken in the presence of the accused, and that he had an opportunity of cross-examining the witness. Harris, *Crim. Law*, p. 371.

To this category should be added the familiar clause:

"The acts or declarations of a deceased person with respect to the relationship, birth, marriage or death of any person related by blood or marriage to a deceased person is relevant when such act or declaration occurred before the question had arisen in respect to which it is to be proved, and the fact to be proved by it is a fact in issue." See Rice, *Civil Evidence*, chap. 10.

§ 87. **When the Rule in Civil Cases does not Apply.**—Another objection to the rule rejecting hearsay evidence arises in civil cases when the declaration proved is adverse to the interests of the party making it; and it further appears that the declarant is dead or beyond the jurisdiction. But the utmost industry fails to disclose a solitary instance in criminal prosecutions where this rule has been accorded the least consideration. This subject was recently under careful examination in the United States district court, and the conclusion reached furnishes sufficient authority for the foregoing text. See *United States v. Mulholland*, 50 Fed. Rep. 413. See also *Snow v. State*, 58 Ala. 375; *Daniel v. State*, 65 Ga. 200; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *Cookham v. State*, 5 W. Va. 510; *Bowen v. State*, 3 Tex. App. 623; *Peck v. State*, 86 Tenn. 267; *State v. White*, 68 N. C. 158.

An illustration is afforded of the doctrine under review in all cases where, as a part of the exculpatory evidence, it is sought to prove admissions made by absent parties tending to show that they themselves were guilty of the crime and not the person on trial. Such testimony in criminal cases is unquestionably incompetent.

§ 88. **The Rule from Roscoe.**—Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the party originally stating the facts does not make the statement under the sanction of an oath; and secondly, that the party against whom the evidence is offered would

lose the opportunity of examining into the means of knowledge of the party making the statement. A less ambiguous term by which to describe this species of evidence is secondhand evidence. The term hearsay evidence is often applied to that which is really not so in the sense in which the term is generally used. Thus, where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by those present during the continuance of the transaction, is admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the most important and unexceptionable kind. In this case, it is not a secondhand relation of facts which is received, but the declarations of the parties of the facts themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. 1 Roscoe, Crim. Ev. p. 25.

Hearsay evidence is not admissible merely because in the particular case no better can be had. *State v. Dart*, 1 Cow. Crim. Rep. 49. But in cases of pedigree or of death it is admissible when from great lapse of time, or for other sufficient cause, the law presumes that original or direct evidence is not attainable. 2 Phil. Ev. (4th Am. ed.) 238; 1 Phil. Ev. (4th Am. ed.) 194, 197; Cowen & Hill, Notes, 612; *Higman v. Ridgway*, 10 East, 120, 129; *Jackson v. Browner*, 18 Johns. 39; *Leggett v. Boyd*, 3 Wend. 379; *Caujolle v. Ferrie*, 26 Barb. 177; *Stein v. Bowman*, 38 U. S. 13 Pet. 220, 10 L. ed. 134; *Mima Queen v. Hepburn*, 11 U. S. 7 Cranch, 290, 3 L. ed. 348; *Jackson v. Etz*, 5 Cow. 319; *Fosgate v. Herkimer Mfg. & H. Co.* 12 Barb. 352; *Augustus v. Graves*, 9 Barb. 596.

Extreme thoroughness has characterized the preceding treatment of this subject and the practitioner is referred to 1 Rice, Civil Evidence, chap. 10, for further views respecting it.

CHAPTER XV.

QUESTIONS OF LAW AND FACT.

- § 89. *Preliminary View.*
- 90. *The Jury as Judges of the Law and the Fact.*
- 91. *Decisions Considered.*
- 92. *Plea of not Guilty Raises a Question of Fact.*
- 93. *Evidence of Habit is a Question of Fact.*
- 94. *The Result Stated.*

§ 89. **Preliminary View.**—We consider it a well settled principle and rule, lying at the foundation of jury trial, admitted and recognized ever since this system was adopted as an established and settled mode of proceeding in courts of justice, that it is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province of the jury to weigh and consider evidence, and decide all questions of fact, and that the responsibility of a correct decision in the first instance is placed upon them. The safety, efficacy and purity of jury trial obviously depends upon the steady maintenance and practical application of this principle. It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact and for the jury to decide ultimately and authoritatively upon the questions of law. In deciding upon this question of fact however, the jury are at liberty to consider that in the vast majority of cases (except as otherwise provided by statute) the evidence of one witness who is entitled to credit is sufficient to prove any fact.

If the jury are the sole judges of the law without any aid from the court in its exposition and application, then whenever the court instructs either for the prosecution or the accused, it invades the province of the jury. Whilst accused insists that the province of the jury is invaded, he would not hesitate to demand a new trial if the jury had found against the law as given to them by the court. Hence, he would, in such case, appeal from the jury to the court, upon the grounds that the court ultimately, and not the

jury, has the right to reverse the decision of the jury as to the law of the case, and because the court has the right to inform the jury as to the law and to enforce its decisions when disregarded, and against the accused, in criminal cases, as well as in civil cases.

"It is not unreasonable to require the jury to say they know the law better than the court before they disregard its instructions. See *Schnier v. People*, 23 Ill. 17; *Fisher v. People*, 23 Ill. 283, and *Mullinix v. People*, 76 Ill. 211, where this form of instruction is approved and sanctioned." *Anderson v. State*, 104 Ind. 467, 5 Am. Crim. Rep. 601, *note*.

§ 90. **The Jury as Judges of the Law and the Fact.**—The principle receives sturdy support in numerous cases that "in all criminal prosecutions, the jury must have the right to determine the law and the facts."

In the case of *Barker v. State*, 48 Ind. 163, Buskirk, *J.*, who wrote the opinion, quoted from Graham & Waterman on New Trials, with approval, the following: "When there is testimony which has any legal effect in a cause, it would be error in the court to determine the weight of it, and the fact which it did or did not ascertain. But whether evidence tends to prove anything pertinent to the issue, is a question for the court; and if there be no testimony that ought to have any legal effect, it is not error for the court to inform the jury that it does not prove what it does not tend to prove."

In the case of *Brooks v. State*, 90 Ind. 428, the court, in commenting upon the instructions in that case, said: "Under our system of practice, the court may sum up the evidence and submit hypothetical cases to the jury, but to do either of those things thoroughly and well usually requires very great care. It is a hazardous proceeding for the court, either directly or through the medium of hypothetical cases, to attempt any comments upon the evidence, and particularly to express any opinion upon it beyond an intimation or statement as to what certain evidence may tend to prove. The safer way is for the court to announce general principles applicable to the salient points of the evidence, and leave all inferences from facts apparently proven, or which the evidence tended to establish, to the jury."

The provision that the jury shall have the right to determine the law and the facts evidently means that the jury have the right to determine all questions of law applicable to such matters as

they are required to consider in making up their verdict, but cannot be rightfully construed to mean that the jury are the sole judges of the law in every respect in a criminal cause. The court judges of the sufficiency of an indictment under the law. It decides all questions of law arising upon the admissibility of evidence, and has the power to grant a new trial when the jury have erroneously determined the law injuriously to the defendant. The judge, too, is required to instruct the jury upon all matters of law necessary for their information in the rendition of a verdict in a criminal cause. Thus, instructing the jury involves, in a qualified sense, at least, the exercise of a judgment upon all matters of law concerning which the judge must give information to the jury. The jury are, consequently, not, strictly speaking, the sole judges of the law in all its relations to a criminal case. *Anderson v. State*, 104 Ind. 467.

§ 91. **Decisions Considered.**—All the authorities tend to the same result. "It is the duty of the jury to act upon the facts. It is the duty of the court to decide the law. The facts being specially found by the jury, it is the duty of the court, not of the jury, to pronounce the judgment of guilty or not guilty. The facts being fully conceded, it is the duty of the court to announce and direct what the verdict shall be, whether guilty or not guilty. Therefore, I cannot doubt the power and the duty of the court to direct a verdict of guilty, whenever the facts constituting guilt are undisputed." *United States v. Anthony*, 11 Blatchf. 200, opinion by Hunt, J.

In the case of *People v. Bennett*, 49 N. Y. 137, the court of appeals of the state of New York, through its Chief Judge, uses the following language: "Contrary to an opinion formerly prevailing, it has been settled that the juries are not judges of the law, as well as the facts, in criminal cases, but that they must take the law from the court. All questions of law arising during the trial are to be determined by the court, and it is the duty of the jury to regard and abide by such determination."

In *United States v. Anthony*, *supra*, the question was, whether the court had power to direct a verdict of not guilty; and the Chief Justice says, the rule results from the principle that the jury must take the law from the court. The duty of the jury to take the law from this source is precisely the same whether it is favorable or unfavorable to the accused.

As illustrative of another phase of the same subject, it is com-

petent to refer to the familiar rule that it is not the province of the court to instruct the jury that insanity is a physical disease. It is a question of fact, to be determined from the evidence, whether insanity exists, and what its character and extent is; and not one to be determined as a matter of law by the court. *Grubb v. State*, 117 Ind. 277. The province of the court is to state the general rules of law to the jury, and it has no right to charge, as matter of law, that insanity is a physical disease of any particular organ of the body. It is not safe to take from works upon medical jurisprudence definitions of insanity, for they are, in many instances, merely speculative opinions, and they are also opinions upon a subject on which it is impossible to reconcile the discordant views of theoretical writers. It must, in each particular case, be a question of fact to be determined from the evidence whether there was insanity, and what was its cause and character. *Plake v. State*, 121 Ind. 433.

It is quite unnecessary to add that if the evidence is of such a character as to create a reasonable doubt whether the accused was of unsound mind at the time the crime was committed he is entitled to a verdict of acquittal. *Polk v. State*, 19 Ind. 170, 80 Am. Dec. 382; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24.

A masterly analysis and review of this subject by Chief Justice Shaw will be found in *Com. v. Anthes*, 5 Gray, 185. There are less elaborate but equally forcible statements of the theory by Story, J., in *United States v. Battiste*, 2 Sumn. 240; by Curtis, J., in *United States v. Morris*, 1 Curt. C. C. 23; by Gilchrist, J., in *Pierce v. State*, 13 N. H. 536; and by Shaw, Ch. J., in *Com. v. Porter*, 10 Met. 263. See also *Montgomery v. State*, 11 Ohio, 427; *Montee v. Com.* 3 Marsh. J. J. 149; *Townsend v. State*, 2 Blackf. 151; *Pierson v. State*, 12 Ala. 153; *Hardy v. State*, 7 Mo. 607; *Nels v. State*, 2 Tex. 280; *Brown v. Com.* 86 Va. 466; and lastly in England by Mr. Hargrave in his *note to Coke Litt.* 155 b.

In *People v. Dick*, 32 Cal. 216, the court says: "It is better for the court, in charging the jury in a criminal case, to avoid assuming any material fact as proved, however clear to the mind of the court such fact may seem to be established, because it is the province of the jury, unaided by the judge, to say whether a fact is proved or otherwise."

And in *State v. Whitney*, 7 Or. 386, Kelly, *Ch. J.*, said: "It is the exclusive province of the jury to determine questions of fact. They and they only have a right to judge of the credibility of witnesses, and the weight and effect of their testimony. And it has always been held to be an erroneous instruction when the court assumed any controverted fact to be proven, instead of submitting to the jury the question whether or not it has been established by the testimony before them." *State v. Mackey*, 12 Or. 154.

§ 92. **Plea of not Guilty Raises a Question of Fact.**—The plea of not guilty is a denial of every material allegation in the indictment. All matters of fact, tending to establish a defense, may be given in evidence under the plea of not guilty. If the defendant refuse to answer an indictment by demurrer or plea, a plea of not guilty must be entered. N. Y. Code Crim. Proc. §§ 338, 339, 342.

§ 93. **Evidence of Habit is a Question of Fact.**—The general rule forbids the opinions or conclusions of witnesses from being given in evidence; but, whether or not a person possesses a certain habit, is rather a question of fact than of opinion or conclusion. It respects a person's condition, as to which witnesses are often allowed to speak without being confined to a narration of the particulars which go to constitute the condition. Thus, under proper circumstances, a common witness may testify directly as to sanity, solvency or insolvency; as to a person being sick or in pain; and, as in *People v. Eastwood*, 14 N. Y. 566, whether a person was drunk or sober; whether a horse was a safe and kind horse. See *Sydleman v. Beckwith*, 43 Conn. 13, where is quite a collection of instances where common observers, not experts, may give their opinions. In *Stanley v. State*, 26 Ala. 26, and *Elam v. State*, 25 Ala. 56, the allowance of precise direct evidence of intemperate habits was sustained. *Gallagher v. People*, 120 Ill. 179.

Whether a person possesses a certain habit, is a question of fact, to which any person knowing may testify. Abbott, Trial Ev. 778; *Stanley v. State*, and *Elam v. State*, *supra*; *Spear v. Drainage Comrs.* 113 Ill. 634; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Sydleman v. Beckwith*, and *People v. Eastwood*, *supra*; *Dahmer v. State*, 56 Miss. 789; *Mapes v. People*, 69 Ill. 530.

§ 94. **The Result Stated.**—Lastly, it should be remembered

that there is no line of distinction better defined in the constitution of the courts of criminal jurisdiction than that which separates the province of the court from that of the jury. *Ad questionem juris respondeant judices, ad questionem facti respondeant juratores*, is the law maxim which defines the line of separation. An intelligent and conscientious jury will look to the court, in the trial of the capital case, with confidence and reliance, for instruction and guidance as to the law of the case, and all things exclusively within his province. In addition to their obligation to accept the law as he pronounces it, they naturally trust to his superior knowledge and his larger experience. *Gordon v. People*, 33 N. Y. 501.

Logically considered, the trial of a criminal case is an effort to complete a final syllogism, having for one premise, matter of law; for the other, matter of fact; and for the conclusion, the resulting proposition of guilty or not guilty. It is the duty of the judge to supply the jury with material for the major premise of this syllogism; and it is the duty of the jury to collect from the evidence the minor premise, compare the two, draw the conclusion, and declare it in their verdict. *Habersham v. State*, 56 Ga. 61.

CHAPTER XVI.

SCIENTIFIC BOOKS IN EVIDENCE.

- § 95. *Species of Evidence not Favored.*
- 96. *Not Read in Argument to Jury.*
- 97. *Partial Review of Authorities.*
- 98. *Views of Mr. Moak.*
- 99. *Exception Noted.*

§ 95. **Species of Evidence not Favored.**—Although the courts are not uniform in their holdings upon the admissibility in evidence of medical and scientific books, the great weight of authority is to the effect that they cannot be admitted to prove the declarations or opinions which they contain. This view proceeds upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination. But while the books are not admissible, an expert witness is not confined wholly to his personal experience, but his opinions formed in part from the reading of treatises prepared by persons of acknowledged ability may be given in evidence. So, also, may a witness refresh his recollection by reference to standard authors; but the judgment or opinion which he gives must be his own, and not merely that of the author.

Dicta are to be found in the reports of the courts of several of the states which, disconnected with the context, would seem to support the proposition that counsel may be permitted to read from medical works of established credit in the profession "as part of his argument." But in one only of the cases, so far as we have been able to find, was it decided that this practice was proper, such decision being necessary to the conclusion reached by the court.

In *Yoe v. People*, 49 Ill. 412, it was said that where the attorney for the people, against the objection of the prisoner, read copious extracts from medical works, the court (without special request on the part of the prisoner) should have instructed the jury that such books are not evidence, but theories simply of medical men. Even if we should accept this as law, the judg-

ment in the present case must be reversed, since the court below did not so instruct the jury. In *Yoe v. People*, the reading of such books by the attorney for the people (in the absence of the instruction mentioned) was held to be error and the judgment was reversed. In our view the court came to the proper conclusion,—that error had occurred. *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

The weight of current authority is decidedly against the admission of scientific books in evidence before a jury, although in some states they are admissible. 2 Greenl. Ev. § 440, and *note*; Whart. Ev. § 665; Rogers, Expert Testimony, §§ 168, 169, *et seq.*, and cases cited in notes. And the weight of current authority is, also, against allowing such treatises to be read from, to contradict an expert, generally. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Davis v. State*, 38 Md. 15; *State v. O'Brien*, 7 R. I. 336. Where, however, an expert assumes to base his opinion upon the work of a particular author, that work may be read in evidence to contradict him. This was, in effect, the ruling in *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516, and it was expressly so ruled in *Pinney v. Cahill*, 48 Mich. 584; *Ripon v. Bittel*, 30 Wis. 614, and *Huffman v. Click*, 77 N. C. 55. See also *Marshall v. Brown*, 50 Mich. 148; Rogers, Expert Testimony, § 181.

Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first, but since the books are not admissible as original cases in such evidence in such cases, it must follow that they are not admissible on cross-examination where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory. *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679.

In *Ripon v. Bittel*, 30 Wis. 614, the question was on the admission of surgical treatise in evidence. The court said that it was urged that they were improperly admitted, and should only

have been allowed to be read in argument, and that "such perhaps may be the general rule." But their admission was approved. This therefore is not an authority on the point in question.

§ 96. **Not Read in Argument to Jury.**—In *Com. v. Wilson*, 1 Gray, 337, Shaw, *Ch. J.*, held that scientific books cannot be read in argument to the jury. He said: "Facts or opinions on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony under oath of persons skilled in such matters. Whether stated in the language of the court, or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person."

§ 97. **Partial View of Authorities.**—This was reiterated by the same judge, in *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178. He there said: "Where books are thus offered, they are in effect used as evidence, and the substantial objection is that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination."

In *People v. Anderson*, 44 Cal. 65, while the practice was considered as improper, it was held not to be a reversible error, because it was a matter within the discretion of the trial court, and unreviewable on appeal except for an apparent abuse of discretion. *People v. Treadwell*, 69 Cal. 226.

And in *Reg. v. Taylor*, 13 Cox, C. C. 77, it was held: "Cases cited in books on medical jurisprudence are not admissible even to form part of an address to the jury." Counsel for defense, in addressing the jury, proposed to read from Taylor's Medical Jurisprudence. Brett, *J.*, said: "This is no evidence in a court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present."

To the same effect are the American cases, in which the question is fully considered and decided. In *State v. O'Brien*, 7 R. I. 338, the court said: "The book offered to be read to the jury was not admissible as evidence. No evidence on the nature of parol testimony could properly pass to them, except under the sanction of an oath; and upon this ground books of science are

excluded, notwithstanding the opinions of scientific men that they are books of authority and valuable as treatises. Scientific men are permitted to give their opinions as experts, because given under oath, but the books which they write containing them are, for want of such oath, excluded." *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

Medical books are not addressed to common readers, but require particular knowledge to understand them. Every one knows the inability of ordinary persons to understand or discriminate between symptoms or groups of symptoms, which cannot always be described to those who have not seen them, and which with slight changes and combinations mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. Scientific men are supposed to be able from their study and experience to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumption of scientific writers of some technical knowledge in their readers, render the use of such works before juries—especially in detached portions and selected passages—not only misleading but dangerous. The weight of authority is against their admission. Such books may be read to discredit a witness who has testified that his views were supported by such authority. *Pinney v. Cahill*, 48 Mich. 584. Or to test the extent of an "expert's" knowledge on cross-examination. *Connecticut Ins. Co. v. Ellis*, 89 Ill. 516. But see generally, *Darby v. Ouseley*, 1 Hurlst. & N. 12; *Terry v. Ashton*, 34 L. T. 97; *Ashworth v. Kittridge*, 12 Cush. 193; *Com. v. Brown*, 121 Mass. 69; *Carter v. State*, 2 Ind. 617; *Gehrke v. State*, 13 Tex. 568; *Collier v. Simpson*, 5 Car. & P. 73; *Com. v. Sturtivant*, 117 Mass. 122; *Brodhead v. Wiltsee*, 35 Iowa, 429; *Harris v. Panama R. Co.* 3 Bosw. 7; *People v. Hall*, 48 Mich. 482.

§ 98. **Views of Mr. Moak.**—From a valuable article in the Albany Law Journal, of Oct. 8, 1881, I extract the following as illustrative of the present attitude of the decisions as regards the reading of scientific books to the jury.

In his interesting paper on "Experts and Expert Testimony," 24 Alb. L. J. 266, Mr. Moak says: "As a rule scientific works cannot be read in evidence to the jury. . . . In summing up to the jury, counsel are entitled to read approved scientific works as a part of their argument." The supreme court of Wisconsin holds that where witnesses examined as medical experts have testified that books recognized as standard authorities in the profession, lay down certain propositions, or sustain certain conclusions, the books thus referred to may be put in evidence for the purpose of discrediting such witnesses. *Ripon v. Bittel*, 30 Wis. 614. In *State v. Hoyt*, 46 Conn. 330, the doctrine as laid down by Mr. Moak was held, but two judges of the five dissented. In Wisconsin and Texas the matter is said to be within the discretion of the court.

It seems a wrong rule that counsel may read to the jury as part of his argument, on scientific facts, books which cannot be put in evidence for the same purpose. Whether the scientific opinion is read to the jury as evidence or as part of an argument seems to work out the same result, namely, to get before the jury the opinion of an expert, at secondhand, and with no opportunity for cross-examination.

Mr. Moak cites three cases to his statement,—*Legg v. Drake*, 1 Ohio St. 286; *Reg. v. Courvoisier*, 9 Car. & P. 362; *Ripon v. Bittel*, 30 Wis. 614. In the first of these cases the court went very near to holding in accordance with Mr. Moak's statement. The proposition was to read from Youatt's work on "Veterinary Surgery." The reading was forbidden. The court on appeal said: "It is not to be denied but that a pertinent quotation or extract from a work on science or art, as from a classical, historical, or other publication may by way of argument or illustration, be not only admissible, but sometimes highly proper. And it would seem to make no difference whether it was repeated by counsel from recollection or read from a book. It would be an abuse of this privilege however, to make it the pretense of getting improper matter before the jury as evidence in the cause." This essay is a fine specimen of inductive reasoning and will well pay perusal. Mr. Moak admirably formulates the existing conditions under which scientific books may be read in evidence. While there can be no hostility to the conclusions that he reaches there well may be a want of sympathy with an exclusionary rule that shuts the averments of modern science from the court room under

any pretext whatever. Law itself is a science and in a state of gestation at that, and yet a law review of any description is admissible before either court or jury. Why should conclusions of other sciences be ignored?

§ 99. **Exception Noted.**—Mr. Abbott in his Trial Brief, § 459, says: "Statements made in books of inductive science, such as standard medical works, are not competent evidence for any purpose. Otherwise of books of exact science, such as the Northampton tables, and the like, if recognized by the court as such, or shown to be such by a qualified witness. Citing *Epps v. State*, 102 Ind. 539; *State v. Baldwin*, 36 Kan. 491; *Com. v. Wilson*, 67 Mass. 337; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Com. v. Brown*, 121 Mass. 69; *People v. Millard*, 53 Mich. 63; *People v. Goldenson*, 76 Cal. 328; *Bales v. State*, 63 Ala. 30; *State v. West*, 1 Houst. Crim. Rep. (Del.) 371; *People v. Cheekee*, 61 Cal. 404; Abbott, Trial Ev. 724, 22 Am. L. Reg. N. S. 105, note; 59 Am. Dec. 185, note.

Judge Redfield will be readily recognized as a jurist unencumbered by visionary speculations of doubtful value upon any topic. In his well known work on the Law of Wills he asserts that reading in the hearing of a jury of "general treatises upon scientific and professional subjects has been allowed by many courts, either as part of the testimony or of the argument of counsel. But when objected to, they have not generally been allowed to be read, either to court or jury." *Com. v. Wilson*, 1 Gray, 337; *Washburn v. Cuddihy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush. 193; *S. P. R. v. Taylor*, 13 Cox, C. C. 77.

Traveling along the same lines of logic the supreme court of Texas has held that it is a subject vested in the sound discretion of the court, as to the extent to which scientific works may be read in evidence. *Dempsey v. State*, 3 Tex. App. 429. See generally, on this subject, *Bayles v. State*, 63 Ala. 30; *State v. Hoyt*, 46 Conn. 330; *State v. O'Brien*, 7 R. I. 336; *People v. Wheeler*, 60 Cal. 581; *Yoe v. People*, 49 Ill. 410.

There can certainly be no objection to such reading in argument to the court. "I believe that those judges, who carefully study the medical writers, and pay the most respectful attention to their scientific researches on the subject, will seldom if ever submit a case to a jury in such a way as to hazard the conviction of a wronged man." *State v. Spencer*, 21 N. J. L. 196.

Books of exact science are under a different rule and are generally admissible.

CHAPTER XVII.

PHOTOGRAPHY IN EVIDENCE.

- § 100. *Value of Photography as Evidence.*
- 101. *The Celebrated Udderzook Case Examined.*
- 102. *Accuracy of Photograph may be Questioned.*
- 103. *Photographs of Documents, when Admissible.*

§ 100. **Value of Photography as Evidence.**—The recent discoveries of Dr. Lippmann have imparted additional value to the art of photography as a means of evidence. Without employing pigments or coloring matter of any description, this discovery by the use of a sensitized film, transparent and free from all granulations or imperfections, taken in connection with an ingenious combination of mirrors of a most perfect polish gives to the negative when fixed the colors of the object photographed. This reproduction of the color is not an artificial accomplishment, but is entirely due to natural phenomena. For many years the problem in photography has been directed toward this discovery. It gives a permanent value to the photographic process which it has never heretofore possessed, and its direct influence upon evidentiary law must have immediate and permanent effect in that it imparts an additional element of certainty to a process that is already of incalculable advantage in both art and science.

§ 101. **The Celebrated Udderzook Case Examined.**—The phenomenal accuracy of the photographic art has become well recognized as a successful ally in the detection of crime. Few cases of recent years have been more tragic in their incidents or more startling in their developments than that of the famous case of *Udderzook v. Com.* 76 Pa. 340. This case was tried in 1873, and the opinion of *Chief Justice* Agnew is especially significant upon the subject now under review. Its obvious pertinency will be questioned by none. The portion contributing to this discussion is in the following language:

“All the bills of exception relate to the use of a photograph of Goss. This photograph, taken on the same plate with a gentleman named Langley, was clearly proved by him and also by the artist who took it. Many objections were made to the use of the

photograph, the chief being to the admission of it to identify Wilson and Goss. That a portrait of a miniature, painted from life and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidence of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen the man known as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The daguerrean process was first given to the world in 1839. It was soon followed by photography. It has become a customary and a common mode of taking and preserving views, as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science, that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retinae through the lenses of the eyes. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses."

§ 102. **Accuracy of Photograph may be Questioned.**—Photographic pictures are the product of natural laws and a scientific process. It is true that in the hands of a bungler, the result may not be satisfactory. Much depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. Most of evidence is but the signs of things. Spoken words and written words are symbols. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive,

but as aids in determining the matter in issue, still being open, like other proofs of identity, or similar matter, to rebuttal or doubt.

Photographs at best, are but secondary evidence—mere “hearsay of the sun;” and when the lack of better evidence compels a resort to them, the correctness of the photographic copies offered must be shown by proof that the process of taking them was conducted with skill and under favorable circumstances, as well as that the result has been a fair resemblance of the object. *Taylor Will Case*, 10 Abb. Pr. N. S. 300, 318; *Hynes v. McDermott*, 82 N. Y. 41, 50, 37 Am. Rep. 538; *Cowley v. People*, 83 N. Y. 464, 478, 38 Am. Rep. 464.

Still it must be deemed established that photographic scenes are admissible in evidence as appropriate aids to a jury in applying the evidence, whether it relates to persons, things or places. *Cozzens v. Higgins*, 1 Abb. App. Dec. 451; *Cowley v. People*, *supra*; *Durst v. Masters*, L. R. 1 Prob. Div. 373, 378.

§ 103. **Photographs of Documents, when Admissible.**—Photographic copies of public documents on file in the departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way, by proof of handwriting. *Leathers v. Salvor Wrecking & Transp. Co.* 2 Woods, C. C. 680.

In the case of *United States v. Messman* (N. Y.) 1 Cent. L. J. 121, which has been on trial before Judge Blatchford, an interesting point of evidence was decided. According to the Herald's report of the case, the action was brought to recover \$253.79, on the following charge: Mr. Messman, on the 20th of July, 1864, presented his pay-rolls for the months of January and February, 1864, and upon the presentation of that paper received \$253.79. It is charged by the government that on March 18, 1864, he had received his pay for those months, and the inference raised by the government was that he had obtained double pay. The counsel for the defense set up that one of the pay-rolls was a forgery. The government had sent on photographic copies of those pay-rolls purporting to have been signed by Mr. Messman. The United States assistant district attorney offered to put those photographic copies in evidence, but Judge Blatchford declined to accede to the offer, saying that as the defense was that one of these pay-rolls was a forgery, counsel for the government must

put in the originals. The counsel replied that the court of common pleas, in a case of this kind, had decided that where it was set up that a paper was forgery, a photographic copy of it could be received in evidence. *Judge Blatchford*: "I am not bound by the decision of the court of common pleas, and I shall not concur in its decision. To admit in evidence a photographic copy of a pay-roll would be acting contrary to well established rules of evidence—in fact, it would be monstrous."

With the consent of defendant, a photograph representing the place where the homicide was committed, was put in evidence, W, a witness for the prosecution, who was present when the photograph was taken and who had seen part of the affair from a window near by, placed three persons in the highway to represent the positions, which, according to his recollection the deceased, the defendant and another person present at the homicide occupied. W's testimony as to that fact was received under objection and exception, and it was held to be no error. *People v. Jackson*, 111 N. Y. 362.

Where the party introducing a photograph in evidence verifies the process by which it was taken by showing that the result obtained fairly resembles the object photographed, the picture becomes competent evidence in the case, provided there is proper occasion for the introduction of any view of the person or premises and the modern cases generally support this view, nor are the cases adverse to these views. *Ruloff v. People*, 45 N. Y. 213; *Udderzook v. Com.* 76 Pa. 340; *Cowley v. People*, 83 N. Y. 465, 38 Am. Rep. 464.

And in another case, when the genuine signature and the disputed signature were both brought into court, magnified photographic copies of each, together with the originals, were submitted to the inspection of the jury, and it was held not to have been error. *Marcy v. Barnes*, 16 Gray, 162; *Cozzens v. Higgins*, 1 Abb. App. Dec. 451; *Church v. Milwaukee*, 31 Wis. 512; *Hollenbeck v. Rowley*, 8 Allen, 473; *Com. v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116 Mass. 98; *Ruloff v. People*, *supra*; *Cowley v. People*, *supra*; *Robinson v. Mandell*, 3 Cliff. 169; *Taylor Will Case*, 10 Abb. Pr. N. S. 300; *Tome v. Parkersburg R. Co.* 39 Md. 36, 17 Am. Rep. 540. See *Daly v. Maguire*, 6 Blatchf. 137; *Re Foster's Will*, 34 Mich. 21; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315; *Re Stephens*, L. R. 9 C. P. 187;

Leathers v. Salvor Wrecking & Transp. Co. 2 Woods, C. C. 682; *Luco v. United States*, 64 U. S. 23 How. 515, 16 L. ed. 545; *Reddin v. Gates*, 52 Iowa, 210; *Ordway v. Haynes*, 50 N. H. 159; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Durst v. Masters*, L. R. 1 Prob. Div. 373.

The general rule is without contradiction that where the photograph is shown to be a faithful representation of whatever it purports to reproduce it is admissible, as an appropriate aid to a jury in applying the evidence; and this is equally true whether it relates to persons, things or places.

For further exposition of this subject see 2 Rice, Civil Evidence, chap. LII. p. 1163, *et seq.*

CHAPTER XVIII.

ORDER OF PROOF.

- § 104. *Order of Proof Largely Discretionary.*
- 105. *General Rule as to the Prosecution.*
- 106. *Usual Order of Proof in Criminal Cases.*
- 107. *Abuse of Discretion as Subject of Review.*
- 108. *Rule as to New Evidence.*
- 109. *Pertinent Evidence may be Received at any Time.*
- 110. *Views of Judge Roosevelt.*
- 111. *Conditional Reception of Evidence on Promise to Show Relevancy.*
- 112. *Continuance Granted when.*

§ 104. **Order of Proof Largely Discretionary.**—In the trial of both civil and criminal causes, the order in which the testimony shall be admitted is one of practice rather than of strict right, and may, in the discretion of the court, be varied to meet the exigencies of a given case, without error being predicable thereon, unless it is manifest that the variance has operated to surprise, or in some way work a legal disadvantage to the excepting party. 1 Archb. Crim. Pr. & Pl. 576; *Pingry v. Washburn*, 1 Aik. (Vt.) 264; *Clayes v. Ferris*, 10 Vt. 112; *Goss v. Turner*, 21 Vt. 437; 1 Bishop, Crim. Proc. § 966.

§ 105. **General Rule as to the Prosecution.**—The courts in the trial of criminal causes have generally, but not universally required the prosecution to put in its whole case in the opening, and have confined it in the close to testimony which tended to rebut the testimony of the respondent. We apprehend that this practice, so far as it varies in this respect from that which obtains in civil cases, has been adopted rather out of tenderness to the respondent, and that before entering on his defense he might be fully apprised of the case which he had to meet, than because of right he could demand it. But in no state, so far as we are aware, has it ever been pushed to the extreme of rejecting in the close, testimony which legitimately tended to weaken the effect of the testimony adduced by the respondent because it also tended to strengthen and confirm the testimony introduced in the opening

by the prosecution. *Pingry v. Washburn*, 1 Aik. (Vt.) 264; *Clayes v. Ferris*, 10 Vt. 112; *Goss v. Turner*, 21 Vt. 437; 1 Saunders, Pl. & Ev. 1100; Stephens, N. P. 1802; Roscoe, Crim. Ev. 79; 1 Stark. Ev. 151, *note k*; *Dave v. State*, 22 Ala. 23; *Kalle v. People*, 4 Park. Crim. Rep. 592; *Sartorious v. State*, 24 Miss. 602; *Mary v. State*, 5 Mo. 71; 2 Phil. Ev. 17; 2 Russell, Crimes, 588; *Rees v. Smith*, 2 Stark. 29; *Crerar v. Sodo*, 1 Mood. & M. 85; *State v. Bridgeman*, 49 Vt. 202, 24 Am. Rep. 124; *State v. Main*, 31 Conn. 572; 1 Best, Crim. Proc. § 966.

§ 106. **Usual Order of Proof in Criminal Cases.**—The jury having been impaneled and sworn, the trial must proceed in the following order:

1. The district attorney, or other counsel for the people, must open the case, and offer the evidence in support of the indictment;
2. The defendant or his counsel may then open his defense, and offer his evidence in support thereof;
3. The parties may then, respectively, offer rebutting testimony, but the court, for good reason, in furtherance of justice, may permit them to offer evidence upon their original case;
4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant or his counsel must commence, and the counsel for the people conclude the argument to the jury;
5. The court must then charge the jury.

Generally in criminal prosecutions it may be said that the order in which the proof is presented to the consideration of the jury is in no sense arbitrary and the variant circumstances of each particular case require more or less latitude in their application. *People v. Wilson*, 55 Mich. 506. See *Spies v. People*, 122 Ill. 1, 9 Crim. L. Mag. 829, 3 Am. St. Rep. 320, 6 Am. Crim. Rep. 570.

The Michigan supreme court has repeatedly held, that the admission of evidence out of strict order is in the discretion of the court. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Danielson v. Dyckman*, 26 Mich. 169; *Somerville v. Richards*, 37 Mich. 299; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728; *People v. Wilson*, 55 Mich. 506. See also *State v. Daubert*, 42 Mo. 242; *State v. Linney*, 52 Mo. 40; *State v. Beuchler*, 103 Mo. 203, as expository of the Missouri rule.

The foregoing text renders any further comment unnecessary as to the arbitrary control accorded the presiding judge in matters

relating to the order of proof. The United States circuit court has held that it is within the discretion of the trial court to grant an adjournment for the purpose of allowing further testimony to be introduced; and this, after one side has rested its case. *United States v. Noelke*, 17 Blatchf. 555. See also *State v. Manuel*, 64 N. C. 601; *Winn v. State*, 43 Ark. 151; *People v. Rector*, 19 Wend. 569; *State v. Harris*, 63 N. C. 1. The discretion however, that is reposed in the presiding judge, if palpably abused may be made the subject of inquiry in the appellate court, and when clearly prejudicial to the accused or granted with reckless improvidence, will constitute reversible error. See *Meyer v. Cullen*, 54 N. Y. 392.

Even after the testimony in a case has closed, it is discretionary with the court whether to open the case or not, to receive additional evidence, and the decision is not reviewable. *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282.

§ 107. Abuse of Discretion as Subject of Review.—An abuse of judicial discretion has always been, and always ought to be, the subject of review in some form.

An abuse of discretion, in a legal sense, does not by any means imply that the judge committing it was actuated by an improper motive. It is quite likely to happen in the hurry of a trial at circuit; and without careful consideration a plain error of law may be committed, resulting to the prejudice of a party, which the judge committing the error would, upon further reflection, be most happy to correct if he could have the opportunity. In such case there is no doubt but that an appellate court will do justice. *Meyer v. Cullen*, 54 N. Y. 392.

§ 108. Rule as to New Evidence.—It is entirely within the discretion of the trial court to permit a party to introduce new evidence to maintain the issue, or to re-examine a witness on his part as to transactions previously testified to; and this is true although the evidence is not strictly rebutting. *Marshall v. Davies*, 78 N. Y. 414; *Huntsman v. Nichols*, 116 Mass. 521; *Gaines v. Com.* 50 Pa. 319; *Dailey v. Grimes*, 27 Md. 440; *Day v. Moore*, 13 Gray, 522; *Dozier v. Jerman*, 30 Mo. 216; *Walker v. Walker*, 14 Ga. 242.

§ 109. Pertinent Evidence may be Received at any Time.—In this connection it must be borne in mind, that the order of proof and, indeed, the whole conduct of the trial as relates to the

admission of evidence is largely within the discretion of the trial court. This we have seen, and when it is further considered that one of the most elementary principles of practice that can be stated is to the effect that the exercise of a mere discretion, upon the part of the presiding judge, is never a fit subject for comment or review, unless there is palpable evidence of gross abuse, it becomes apparent that material evidence is always in order at any time before the conclusion of the arguments, provided the right to its admission is sanctioned by the court. *Mr. Justice Lumpkin* expressed these sentiments in more appropriate language in delivering the decision in an early Georgia case: "I must say that so much adverse am I to withholding testimony, that I can hardly conceive of a case so gross and palpable that I should feel constrained to control the discretion of the circuit judge from receiving at any time additional affirmatory, cumulative or corroborative evidence of facts previously proved, or which tends to strengthen and add force or probability to such evidence." *Walker v. Walker*, 14 Ga. 242.

§ 110. **Views of Judge Roosevelt.**—*Judge Roosevelt*, in a criminal case decided by the New York general term in 1859, entertained similar views with the full concurrence of his associate judges, *Sutherland* and *Lott*. From a careful review of that case it appears, that in criminal as well as in civil cases, it is within the discretion of the court to receive further evidence on the part of the prosecution after the summing up has been commenced. Ordinarily, the prosecution must introduce all the evidence in support of the indictment, before resting. A prosecuting attorney may supply an omission, as matter of right; but this implies that he may do so as matter of favor; in other words, that it is discretionary with the judge, in view of all the circumstances, to grant the permission or to refuse it; and that no appeal, in such case, lies from his decision. *Kalle v. People*, 4 Park. Crim. Rep. 591.

These positions are sustained by a formidable array of authority. See *Com. v. Ricketson*, 5 Met. 412; *Taylor v. Shemwell*, 4 B. Mon. 575; *Fleet v. Hollenkemp*, 13 B. Mon. 219; *Hess v. Wilcox*, 58 Iowa, 380; *State v. Rose*, 33 La. Ann. 932; *Tierney v. Spiva*, 76 Mo. 279; *State v. Clyburn*, 16 S. C. 375; *Ruggles v. Coffin*, 70 Me. 468; *Breedlove v. Bundy*, 96 Ind. 319; *George v. Pilcher*, 28 Gratt. 299; *Larman v. Huey*, 13 B. Mon. 436; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *McDowell v. Crawford*, 11

Gratt. 377; *Williams v. Hayes*, 20 N. Y. 58; *Eggspiller v. Knockles*, 58 Iowa, 649; *Darland v. Rosencrans*, 56 Iowa, 122; *McKinney v. Jones*, 55 Wis. 39; *State v. Porter*, 26 Mo. 201; *State v. Coleman*, 27 La. Ann. 691; *Johnston v. Mason*, 27 Mo. 511; *Couch v. Charlotte, C. & A. R. Co.* 22 S. C. 557; *Jackson v. Tallmadge*, 4 Cow. 450; *Lewis v. Ryder*, 13 Abb. Pr. 1; *Alexander v. Byron*, 2 Johns. Cas. 318; *Stacy v. Graham*, 3 Duer. 444; *Burger v. White*, 2 Bosw. 92; *Anthony v. Smith*, 4 Bosw. 503; *Speyer v. Stern*, 2 Sweeny, 516; *Williams v. Hayes*, 20 N. Y. 58; *Kellogg v. Kellogg*, 6 Barb. 116; *Barrett v. Carter*, 3 Lans. 68; *People v. Rector*, 19 Wend. 569.

In the case last cited, it was said: "The refusal to recall a witness to restate his testimony, after a cause has been summed up and the jury charged, is a matter of discretion appertaining to the court before whom the trial is had; with the exercise of which a court of review will not interfere."

§ 111. **Constitutional Reception of Evidence on Promise to Show Relevancy.**—That a court may base its action upon the avowals and declared purposes of counsel is shown by *Dunn v. People*, 29 N. Y. 523. It would too much hamper the trial courts in their proceedings, if they were much restricted in the exercise of a discretion in the order in which proof should be received. There must be a discretion vested in them, in such case, for the convenience and dispatch of business, and often for a proper understanding and appreciation of the testimony. *McCarney v. People*, 83 N. Y. 408, 415, 38 Am. Rep. 456.

A well considered case in Michigan holds directly contrary to the New York rule and the practice generally regarding the conditional reception of evidence must be regarded as involved in more or less contradiction. *People v. Millard*, 53 Mich. 63; *Zell v. Com.* 94 Pa. 558, 2 Crim. L. Mag. 22.

§ 112. **Continuance Granted when.**—Continuances ought always to be granted when, from the showing, justice requires it to be done, and to enable a defendant to procure all legal and competent evidence necessary for the fair presentation of his case, if he had used due diligence to obtain the same. Technical objections should not ordinarily prevent the granting of the motion for continuance, if it is necessary to the proper presentation of the defendant's case. But continuance will not be granted unless it is shown that there is some necessity for the production of the

proposed testimony. Hence, in affidavits for a continuance, it is the uniform practice for the party applying for the continuance, to state that he has no other witness by whom he can establish the same fact. Continuances will not be allowed to enable the party to produce evidence that is merely cumulative, unless there is some necessity shown therefor,—such as, that there will be a conflict in the evidence in reference to the particular matter in regard to which the absent witness is expected to testify. *Eighmy v. People*, 79 N. Y. 546; *Roberts v. People*, 9 Colo. 458; *Dunn v. People*, 109 Ill. 635; *Bagwell v. State*, 56 Ga. 406; *State v. Dakin*, 52 Iowa, 395; *Beavers v. State*, 58 Ind. 530; *Walker v. State*, 13 Tex. App. 618; *State v. Lewis*, 74 Mo. 222; *Shook v. Thomas*, 21 Ill. 87.

The evidence usually relied upon to secure a continuance in a criminal case is brought to the attention of the trial court through the medium of affidavits, or upon such direct statements in open court by reputable counsel as will entitle them to judicial consideration. In cases of felony the absence of the accused is a sufficient cause for a continuance. *Brown v. State*, 24 Ark. 620; *State v. Cross*, 27 Mo. 332; *People v. Perkins*, 1 Wend. 91; *Graham v. State*, 40 Ala. 659; *People v. Koehler*, 5 Cal. 72; *Jackson v. Com.* 19 Gratt. 656; *State v. Dooly*, 64 Mo. 146; *Sneed v. State*, 5 Ark. 431; *State v. Bertin*, 24 La. Ann. 46; N. Y. Code Crim. Proc. § 465.

Public indignation against the accused, owing to the enormity of the alleged offense, when satisfactorily shown to the court should result in a continuance. *State v. Wells*, 61 Iowa, 629; *Bishop v. State*, 9 Ga. 121; *Cox v. State*, 64 Ga. 374; *Beavers v. State*, 58 Ind. 530. Sudden illness of the attorney for the accused, and possibly unavoidable absence may be shown in support of a motion for continuance. *Bagwell v. State*, 56 Ga. 406. And, in most jurisdictions, insufficient time to properly prepare the defense may be urged with propriety. *State v. Lewis*, 74 Mo. 222.

By statutory enactment in New York, the defendant after a plea of not guilty is entitled to a continuance of at least two days to prepare for his trial if he require it. The trial itself however, may be had in absence of the accused if he appear by counsel, but, if the indictment be for a felony, the defendant must be personally present. N. Y. Code Crim. Proc. § 356, 357.

It is the constitutional privilege of one accused of crime to have

the assistance of counsel and this privilege carries with it the co-ordinate right to a personal interview. See U. S. Const. 6th Amendment; Cooley, Const. Lim. 334. To give life and effect to this constitutional provision, and to make the presence of counsel upon the trial a valuable right it must include a private interview with his counsel prior to the trial. Westbrook, *J.*, in *People v. Risley*, 1 N. Y. Crim. Rep. 492.

So "every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours." U. S. Rev. Stat. § 1034; N. Y. Code Crim. Proc. § 108; *People v. Willett*, 3 N. Y. Crim. Rep. 54, 1 How. Pr. N. S. 197.

Any failure to accord this right may be shown by affidavit, and where it satisfactorily appears that further time should be allowed to perfect the defense, a continuance should be granted.

Ex parte affidavits are evidence in judicial proceedings only as some law has declared them to be evidence, and they are not evidence of any facts stated in them unless some law makes them such. Still they may be effectively employed in an application for a continuance as a basis for the motion.

CHAPTER XIX.

EVIDENCE NECESSARY TO SECURE A CONTINUANCE.

§ 113. *Rule the Same as in Civil Cases.*

114. *Right not Affected by Admissions of Opposite Party.*

115. *What Evidence is Necessary to Secure.*

116. *What Motion Papers should Prove.*

§ 113. **Rule the Same as in Civil Cases.**—"The rule governing applications for a continuance," said Sutherland, *J.*, in *People v. Vermilyea*, 7 Cow. 369, "is substantially the same in civil and criminal cases; though in the latter the authorities all agree that the matter is to be scanned more closely, on account of the superior temptation to delay and escape the sentence of the law. . . . In cases where the common affidavit applies, the court has no discretion. The postponement is a matter of right, resting on what has become a principle of the common law. But where there has been laches, or there is reason to suspect that the object is delay, the judge at the circuit may then take into consideration all the circumstances, and grant or delay the application at his pleasure. Where the subject takes this turn, the application ceases to be a matter of right, and rests in discretion." This doctrine seems to be borne out by the authorities. 2 Phil. Ev. Cowen & Hill's Notes, 353.

§ 114. **Right not Affected by Admissions of Opposite Party.**—Shall a party who has made out good grounds for a continuance, on account of the absence of witnesses, be ruled to trial upon the admission of his adversary, that his witnesses who are absent, if present would swear to the facts which he states he expects to prove by them; or shall he be required to admit the fact proposed to be proven by them?

The common law rule of confronting the jurors with the witnesses in a public, oral examination, has ever been regarded by the wisest jurists as a most invaluable rule in the ascertainment of truth. By such an examination, a party has not only the benefit of the naked fact detailed, but also the benefit of the deportment, the manner, the physiognomy, the impression, detail, and intelligent reasons given by his witnesses, which are calculated to force

conviction upon the triers, and greatly outweigh the same number of witnesses on the other side. Of all these he would be deprived, if compelled to go to trial upon the naked admission that his witnesses would swear to the facts which he proposes to prove by them. Such admission, if not forgotten, would make but little impression, amid a consistent and rational detail of a similar number of witnesses, deposing, orally, to facts of a counteracting character.

His right to bring his witnesses before the jury is a legal right, and which may be of essential advantage to him, especially in the establishment of controverted facts, and of which he ought not to be deprived. If, therefore, entitled to a continuance in such a case, he ought not to be deprived of it by any admission short of the admission of the fact intended to be proved by his absent witnesses. *Smith v. Creason*, 5 Dana, 298, 30 Am. Dec. 688; *Dominges v. State*, 7 Smedes & M. 475, 45 Am. Dec. 315; *Goodman v. State*, 1 Meigs, 195.

Where the evidence discloses sufficient ground for a continuance, the prosecution cannot frustrate the application by stipulating to admit the evidence sought to be adduced. By constitutional guarantee in every state in the Union the prisoner has a right to the personal presence of witnesses in his behalf. *State v. Berkley*, 92 Mo. 41; *State v. Parker*, 13 Lea, 226.

Much controversy has surged about this proposition but the dissenting opinion of *Mr. Justice* Sherwood in the recent case of *State v. Jennings*, 81 Mo. 85, will go very far toward placing the the question beyond cavil or demur.

In several jurisdictions this question is determined by statutory enactment and is granted once as matter of right. If allowed as to one joint defendant the others are entitled to the same privilege. *Stephenson v. State*, 5 Tex. App. 79; *State v. Fraser*, 2 Bay, 96. But see *State v. McComb*, 18 Iowa, 43; *Thompson v. State*, 9 Tex. App. 301. As to the right to a prosecution by continuance, see *People v. Fuller*, 2 Park. Crim. Rep. 16.

Where the defendant in a criminal case reads, as the evidence of an absent witness, the statement contained in the affidavit for continuance of what the evidence of the witness would be if present, the state may contradict his testimony or impeach the witness as if he were present. And the state may offer the witness himself to contradict such statement so read in evidence. *State v. Mann*, 83 Mo. 589.

Where a defendant in a criminal case, offers a sufficient affidavit for continuance, stating the facts to which the absent witnesses are expected to testify, it is error to refuse a continuance, even though the prosecuting attorney offers to admit, not simply that the witness would testify to the facts stated, but also, the truth of the facts stated; for the defendant has the constitutional right, to have the witnesses personally present at the trial. Where the circuit court refuses a continuance for the insufficiency of the reasons stated in the affidavit, the court of errors would be extremely cautious and circumspect in controlling its discretion, though they entertained a clear opinion that the reasons were sufficient. *Goodman v. State*, Meigs, 195.

§ 115. **What Evidence is Necessary to Secure.**—Privilege of a postponement is an absolute right where either party can produce satisfactory reasons for the request, and although there is abundant dicta intimating that the application to postpone is addressed to the sound discretion of the court, still the careful analysis of the authorities will clearly establish the fact that any arbitrary exercise of this discretion is discountenanced, and where the application is improvidently refused the appellate court will grant relief.

Without attempting an extended tabulation of all the cases that have been deemed sufficient ground for postponement the following may be regarded as among the most prominent, and any evidence based upon one of these several grounds for a continuance is considered pertinent. (1) A disturbed and excited state of the public mind prejudicial to the accused. (2) Illness of counsel. (3) Absence of the defendant, in cases of felony. (4) Surprise at some unexpected development of the case which could not have been reasonably anticipated. (5) Want of adequate time in preparation of the defense. (6) Refusal to admit counsel to the jail premises for the purpose of consultation with the prisoner. In support of these propositions are cited as illustrative: *Re Sheriff of New York*, 1 Wheeler Crim. Cas. 303; *Stewart v. State*, 58 Ga. 577; *Brown v. State*, 24 Ark. 620; *State v. Cross*, 27 Mo. 332; *People v. Kohler*, 5 Cal. 72; *Jackson v. Com.* 19 Gratt. 656; *Graham v. State*, 40 Ala. 659; *State v. Bertin*, 24 La. Ann. 46; *Clark v. State*, 4 Humph. 254; *Burley v. State*, 1 Neb. 385; *Sweeden v. State*, 19 Ark. 205; *People v. Perkins*, 1 Wend. 91; *Andrews v. State*, 2 Sneed, 550; *Prine v. Com.* 18 Pa. 103; *Shapoomash v.*

United States, 1 Wash. Terr. 188; *State v. Dooly*, 64 Mo. 146; *State v. Allen*, 64 Mo. 67; *Dunn v. Com.* 6 Pa. 384; *Sneed v. State*, 5 Pike, 431; N. Y. Code Crim. Proc. § 465.

When an application for an adjournment is made in good faith and upon proper facts shown, and not for the purpose of delay, it is error at law to refuse same, and such refusal is reviewable. *Brooklyn Oil Works v. Brown*, 38 How. Pr. 451; *Onderdonk v. Ranlett*, 3 Hill, 323; *Ogden v. Payne*, 5 Cow. 15; *Hooker v. Rogers*, 6 Cow. 577; *People v. Vermilyea*, 7 Cow. 383; *Pulver v. Hiserodt*, 3 How. Pr. 49; 2 Tidd. Pr. 708; 1 Archb. Crim. Pr. & Pl. 210; 1 Chitty, Crim. Law, 392; *King v. D'Eon*, 1 W. Bl. 510, 3 Burr. 1513; *Webster v. People*, 92 N. Y. 422.

Should it appear, however, that the evidence sought is clearly inadmissible, or is cumulative in its character the motion should be denied. *Nelms v. State*, 58 Miss. 362; *Krebs v. State*, 8 Tex. App. 1; *Varnadoe v. State*, 67 Ga. 768. And so proof of the pendency of a civil action against the accused or even of another indictment for the same offense is insufficient evidence upon which to base an order of continuance. *Eighmy v. People*, 79 N. Y. 546; *Loeffner v. State*, 10 Ohio St. 598.

§ 116. **What Motion Papers Should Prove.**—To sustain the application for a continuance the affidavit should show: (1) The material nature of the evidence sought. (2) High degree of probability that it may be secured. (3) The exercise of due diligence in the effort already made to obtain it. *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 632; *Moody v. People*, 20 Ill. 315; *State v. Bennett*, 52 Iowa, 724; *State v. Hagan*, 22 Kan. 490; *Blige v. State*, 20 Fla. 742; *McDermott v. State*, 89 Ind. 187; *People v. Francis*, 38 Cal. 183; *State v. Gray*, 14 Nev. 212, 7 Crim. L. Mag. 84; *People v. Vermilyea*, 7 Cow. 369; *State v. Files*, 3 Brev. (S. C.) 304; 1 Tread. (S. C.) 234; *Wray v. People*, 78 Ill. 212; *State v. Smith*, 8 Rich. L. 460; *State v. Lange*, 59 Mo. 418; *Mackey v. Com.* 80 Ky. 345, 4 Ky. L. Rep. 179; *People v. Ah Yute*, 53 Cal. 613.

The case of *King v. D'Eon*, 1 W. Bl. 510 and 3 Burr. 1513, is a leading case on this subject, and contains the principles above formulated which have since prevailed in relation to a continuance. Lord Mansfield says in that case, "three things are necessary to put off a trial: 1. That the witness is really material, and appears to the court so to be. 2. That the party who applies has

been guilty of no neglect. 3. That the witness can be had at the time to which the trial is deferred." Wilmot, *J.*, said that the rule is the same in criminal and civil cases; and Yates, *J.*, said, whatever indulgence the law gives to defendant in civil cases, it ought, *a fortiori*, to give in criminal.

Where the application for a continuance is made in good faith and is based upon evidence of proper facts which go to negative the theory of mere captious delay it is reversible error to refuse it. *Brooklyn Oil Works v. Brown*, 38 How. Pr. 451; *Onderdonk v. Ranlett*, 3 Hill, 323; *Ogden v. Payne*, 5 Cow. 15; *Pulver v. Hiserodt*, 3 How. Pr. 49; 2 Tidd, Pr. 708; 1 Archb. Crim. Pr. & Pl. 210; Chitty, Crim. Law, 492; *King v. D'Eon*, 1 W. Bl. 510; 3 Burr. 1513.

But if there are suspicious circumstances attending the application, then the court will require the party to be more minute in stating the circumstances and facts upon which the application rests. This general rule is found in books of practice both civil and criminal. 2 Tidd, Pr. 708; 1 Archb. Crim. Pr. & Pl. 210; 1 Dunl. 586, 587; 1 Chitty, Crim. Law, 492.

CHAPTER XX.

VARIANCE, IDEM SONANS.

- § 117. *The Term Variance Defined.*
- 118. *Proofs and Allegations must Correspond.*
- 119. *General Rule of Criminal Pleading Stated.*
- 120. *Illustrations of these Rules.*
- 121. *Only Material Variance will be Regarded.*
- 122. *When Variance between Indictment and Proof will Call for Amendment.*
- 123. *The Doctrine of Idem Sonans Stated.*
- 124. *Instances of Immaterial Variance in Name.*
- 125. *Extended Tabulation of the Cases from Rapelje's Criminal Procedure.*

§ 117. **The Term Variance Defined.**—Variance has been defined as a disagreement between the allegation and the proof in some matter which, in point of law, is essential to the charge or claim. *House v. Metcalf*, 27 Conn. 638; *State v. Wadsworth*, 30 Conn. 57; *Keiser v. Topping*, 72 Ill. 229.

§ 118. **Proofs and Allegations must Correspond.**—Undoubtedly, the rule is that the proofs must correspond with the allegations in the declaration, but the requirement in that behalf is fulfilled, if the substance of the declaration is proved. *Nash v. Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527.

The North Carolina supreme court has decided, that where there is a variance between the allegation and proof in a criminal proceeding, its effect is to vacate the verdict, but leaving the prisoner liable to re-trial. *State v. Sherill*, 82 N. C. 694.

Where it appears that a party is as well known under his alias name as under his real name, a variance in names will be disregarded. *Ehlert v. State*, 93 Ind. 76; *Hunter v. State*, 8 Tex. App. 75.

And it has been held, that where a statute of limitations imposes a specified time within which a criminal prosecution must be instituted, a variance as to the time in which the offense is committed is immaterial, provided the time alleged in the indictment and that proved at the trial, are both within the statutory limitations. *State v. Bell*, 49 Iowa, 440.

§ 119. **General Rule of Criminal Pleading Stated.**—It is a general rule of criminal pleading that material allegations must be proved, and that if an allegation need not be proved, it is not material. *State v. Porter*, 38 Ark. 637. The proof must always correspond with the charge in the indictment (*United States v. Darton*, 6 McLean, 46) even though the offense is set out with greater particularity than is required; nothing connected with the offense can be disregarded as surplusage. *United States v. Brown*, 3 McLean, 233. Where an offense is susceptible of commission in more than one way, it must be proved to have been committed in the particular way charged, and in no other way. *Kennedy v. State*, 9 Tex. App. 399. The precise offense charged, and no other, must be proved. *Rapalje*, Crim. Proc. § 107.

§ 120. **Illustrations of these Rules.**—A distinction obtains as to those variances occasioned by the proof and the context or recitals of an enactment or even of a contract. Variance under such conditions must be regarded as fatal. *Butler v. State*, 3 McCord, L. 383.

Where the prosecutor states the offense with greater particularity than he is bound to do, the proof must correspond with the averments. That cannot be regarded as surplusage, which is connected with the offense. *United States v. Brown*, 3 McLean, 233.

Thus, in an indictment charging the defendant with having in his custody and possession, with intent to sell the same, "one pint of adulterated milk, to which milk water had been added," the allegation is descriptive, and is not supported by proof that the milk in question was adulterated by adding water to pure milk. *Com. v. Luscomb*, 130 Mass. 42.

The rules of pleading are the same in civil as in criminal actions. In *Jerome v. Whitney*, 7 Johns. 321, the court held that if the plaintiff in his declaration on a note for value received, instead of stating generally that it was given for value received, sets forth specially in what the value received consisted, he is bound to prove the particular value according to the averment, and the general knowledge of value in the note is not sufficient to support the declaration. So in *United States v. Porter*, 3 Day, 283, it was held, that where in an indictment for stopping the mail, the contract of the carrier of the mail with the postoffice department, was set out, it must be proved. And where an indictment for burglary

in the house of J. D. with intent to steal the goods of J. W. it appearing that J. W. had no property there, it was held material to state truly in whom the property of the goods was.

In 1 Chitty, Pl. 263, it is said, That if however the matter unnecessarily stated be wholly foreign and irrelevant to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage. If the prosecutor choose to state the offense with greater particularity than is required by the statute, he will be bound by the statement, and must prove it as laid. *Rex v. Dawlin*, 5 T. R. 311; *United States v. Brown*, 3 McLean, 233.

§ 121. **Only Material Variance will be Regarded.**—A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense. Abbott, Trial Brief, § 680.

This entire subject of variance has received direct illumination from a recent decision of the New York court of appeals. *Mr. Justice Earl*, writing for affirmance and voicing the unanimous opinion of his associates says: "It is also claimed that there was a false variance between the indictment and the proof, in that the indictment alleges that Harris swore before the fire marshall that there were 60,000 cigars in the building at the time of the fire, whereas the proof showed that he swore that there were 65,000. This objection was in no form made at the trial, and therefore cannot avail here. If it had been made, the evidence as to that item could have been excluded or waived, or the judge could have instructed the jury to disregard the evidence and that there would have been still enough to uphold a conviction. The variance was as to the one of a number of distinct items as to which Harris was charged with swearing falsely, and if the jury had found that he swore falsely as to the other items, or as to any one of them, a verdict of guilty would have been proper. Where an indictment charges that the prisoner has stolen a number of articles, or has inflicted a number of blows, or has obtained goods by a number of false pretenses, or has sworn falsely in an affidavit as to several facts, it is not necessary to prove all that is charged. It is sufficient to prove enough to make out the offense charged. 3 Russell, Crimes (4th London ed.) 105; *Reg. v. Rhodes*, 2 Ld. Raym. 886; 3 Starkie, Ev. 860; *Tomlinson's Case*, 4 City Hall Rec. 125; Roscoe, Crim. Ev. (6th Am. ed.) 763. . . .

“The strictness of the ancient rule as to variance between the proof and the indictment has been much relaxed in modern times. Variances are regarded as material, because they may mislead a prisoner in making his defense, and because they may expose him to the danger of being again put in jeopardy for the same offense.” *Harris v. People*, 64 N. Y. 148.

§ 122. **When Variance between Indictment and Proof will Call for Amendment.**—If there be a variance between the indictment and the evidence brought forward to sustain it, the courts, on application, will amend the indictment, as in the following instances: where the variance is in the setting out of any matter in writing, or in print, or in the name of any county, city, town, parish, etc., or in the name of the owner of any property which is the subject of the indictment, or in the name of any person injured, or intended so to be, by the offense charged, or in the name of any person mentioned in the indictment, or in the “name or description of any matter or thing whatsoever therein named or described,” or in the ownership of property therein named or described.

But there are some cases of variance where an amendment is not necessary. Upon an indictment for embezzlement, if the evidence prove a larceny, the jury may acquit the prisoner of the embezzlement and find him guilty of simple larceny, upon an indictment for obtaining goods or money under false pretenses; if the evidence prove a larceny, the defendant, notwithstanding, may be convicted of false pretenses; upon an indictment for a misdemeanor, if the evidence prove a felony, the defendant shall not, on that account, be acquitted, unless the court think proper to discharge him from that indictment, and order him to be prosecuted for the felony. Archb. Crim. Pr. & Pl. 124.

§ 123. **The Doctrine of Idem Sonans Stated.**—There is a rule of growing importance by which courts, for many years, have evinced, by their decisions, a disposition to recede from the fading adherence to common law technicalities, and hold rather to substance than mere form. Modern decisions conform to the rule that a variance, to be material, must be such as to mislead the opposite party to his prejudice, and hence the doctrine of *idem sonans* has been much enlarged by modern decisions, to conform to the above salutary rule. The law does not treat every slight variance, if trivial, such as the omission of a letter in the name, as

fatal. The variance should be a substantial and material one to be fatal. *Harris, Identification*, § 139; *Trimble v. State*, 4 Blackf. 435; *Stevens v. Stebbins*, 4 Ill. 25.

Courts are not fastidious in enforcing absolute precision in regard to orthography. Names admitting of the same pronunciation are often made up of very different letters. In these cases, a mistake of one mode of spelling for another is unimportant, even in an indictment. The public prosecutor is not bound to ascertain the particular letters used by the accused in writing his name, for this might often be impracticable. But where the orthography of the indictment composes a name which by the ordinary rules of pronunciation produces a different sound from the true one, the mistake will be fatal.

The doctrine of *idem sonans* is too well established to be disregarded. If the name as laid in the indictment, and the name proven on the trial, were of the same sound, then there is not a fatal variance, although the two names may have been spelled slightly different. *Donnel v. United States*, 1 Morris (Iowa) 141, 39 Am. Dec. 457; *Parchman v. State*, 2 Tex. App. 228; *Schooler v. Asherst*, 1 Litt. (Ky.) 216; *Barnes v. People*, 18 Ill. 52; *Rex v. Tannett*, Russ. & R. 351; *Rex v. Shakespeare*, 10 East, 83; *Com. v. Gillespie*, 7 Serg. & R. 479; *Swails v. State*, 7 Blackf. 324.

§ 124. **Instances of Immaterial Variance in Name.**—It is held to be an immaterial variance where the words may be sounded alike, without disturbing the power of the letters found in the variant orthography. *Adams v. State*, 67 Ala. 89. See Rice, Annotated Colo. Code, Civ. Proc. title *Idem Sonans*.

In a recent Texas case Judge Willson says: "Hix Nowels" and "Hicks Nowells" are *idem sonans*, and the court did not err in its charge to the jury in disregarding the difference in the orthography of the name, and in omitting to submit to the jury for their determination whether or not the name as spelled in the indictment was the same as that proved on the trial. There was no room for doubt upon this question, and the court might well assume that the names were identical. If there had been any doubt as to whether the names were *idem sonans*, it would have been proper, and perhaps essential, to have submitted the question to the jury. *Henry v. State*, 7 Tex. App. 388; *Spoonmore v. State*, 25 Tex. App. 358.

The law does not treat every slight and trivial variance, such as the omission of a letter, as fatal. The variance should be a substantial and material one, such as would render the instrument offered in evidence a different and distinct instrument from the one described in the petition, to authorize the court to exclude it from the jury on the ground of variance. The rule of *idem sonans*, when strictly adhered to, is considered too rigid, and has been much relaxed in modern practice. *Stevens v. Stebbins*, 4 Ill. 25.

It is claimed that mere identity of sound is a surer method of designating the names of persons than that of depending upon mere identity in the orthography. *Ahitbol v. Beniditto*, 2 Taunt. 401; *Myer v. Fegaly*, 39 Pa. 429.

If the sound of a name *idem sonans* be not affected by a misspelling which occurs, such error is immaterial, and any two names being alike in original derivation and used interchangeably, though different in sound, do not, by the use of either, constitute a material variance. 2 Rolle, Abr. 135; Bacon, Abr. title *Misnomer*. The doctrine of *idem sonans* should not be too rigidly enforced. The principal question in all cases should ask as to the materiality of the variance. *Belton v. Fisher*, 44 Ill. 32. And this is always a question of fact, to be determined by the jury. In the case of foreign names, courts are reluctant to pronounce that a variance which in most instances is a simple misspelling, or the result of a mispronunciation shall affect vested rights honestly acquired. In an early case the supreme court of Illinois has held, where material variance was claimed in the names of a conveyance that Michael Allen, named in a deed as grantor was, presumptively, Michael Allaine, grantee of the same property as, also, that Otoline Allaine was, presumptively, Antoine Allaine. *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148.

The misspelling of a defendant's name in a summons is no excuse for non-appearance to defend, especially where it appears that the name "Butler" was written "Bulter." Knowing there is a suit against himself, defendant is held bound to appear. *Hermann v. Butler*, 59 Ill. 225.

The rule is, that if the distinction in the pronunciation of the names is indistinguishable in ordinary conversation, the doctrine of *idem sonans* applies. *Barnes v. People*, 18 Ill. 52. The position contended for is sustained by a Maine decision which holds

that, although the surname of a party defendant has been spelled in seven different ways in the course of a judicial proceeding, the names were all *idem sonans* and sufficiently identified the defendant. *Millett v. Blake*, 81 Me. 531.

§ 125. **Extended Tabulation of the Cases from Rapalje's Criminal Procedure.**—Mr. Rapalje in his well known work on Criminal Procedure at Section 83, tabulates a series of cases that have been decided upon this interesting topic. The section is reproduced in this connection as affording by far the most luminous exposition of this subject to be found in any of the text-books early or late.

The rule as to the materiality of variances between the name as stated in the indictment and as proved on the trial, is that the mere misspelling of a name, whether of the accused or of a third person, is not fatal to the indictment, unless the difference causes a material change in the pronunciation of the name; whether it does or not is, on the trial of the general issue, a question for the jury and not for the court (*Underwood v. State*, 72 Ala. 220. But see as to the last point, *Com. v. Riggs*, 14 Gray, 376, 77 Am. Dec. 333) or where the court does pass upon it, a stringent construction will not be applied. *Foster v. State*, 1 Tex. App. 531. Thus "Mary Etta" is *idem sonans* with "Marietta," *Goode v. State*, 2 Tex. App. 520; "Hutson" with "Herdson," *State v. Hutson*, 15 Mo. 512 (a strange conclusion); "Owens D. Havelly" with "Owen D. Haverly," *State v. Havelly*, 21 Mo. 498; "Blankenship" with "Blackenship," *State v. Blankenship*, 21 Mo. 504 (one judge dissenting); "George Washington Bank" with "Geo. Washington Bank," *Patterson v. People*, 12 Hun, 137; "Chin Chan" with "Chin Chang," *Wells v. State*, 4 Tex. App. 20; and "McLaughlin" with "McGlofin," *McLaughlin v. State*, 52 Ind. 476. On the other hand, the following among others have been held not to be *idem sonans*: "Spintz" and "Sprintz," *United States v. Spintz*, 18 Fed. Rep. 377; "Clements Turner" and "Turner Clements," *Clements v. State*, 21 Tex. App. 258; "Tarpley" and "Tapley," *Tarpley v. State*, 79 Ala. 271; "Kinney" and "McKinney," *Kinney v. State*, 21 Tex. App. 348; "Donald" and "Donnell," *Donnell v. United States*, 1 Morris (Iowa) 141, 39 Am. Dec. 457; "Mincher" and "Minshen," *Adams v. State*, 67 Ala. 89; "Abie Burgamy" and "Avie Burgamy," *Burgamy v. State*, 4 Tex. App. 572; and "Wood" and "Woods," *Neiderluck v. State*,

21 Tex. App. 320. Some of these decisions are unsatisfactory, notably a North Carolina case, where "Willis Fain" was held to be *idem sonans* with "Willie Fanes," *State v. Hare*, 95 N. C. 682; but no doubt "Chatam Bank" is *idem sonans* with "Chatham Bank." *Roth v. State*, 10 Tex. App. 27. Where the name "George J. Farley" appeared four times in an indictment which went on to allege an intent to kill said "Frank I. Farley," it was held proper to instruct the jury that if this was clearly a clerical error and not prejudicial to the accused, it was not a fatal variance. *State v. McCunniff*, 70 Iowa, 217; *State v. Ford*, 38 La. Ann. 797. So, where on the separate trial of one for a joint offense with one "Land," it appeared the latter's name was "Lance," but there was no doubt as to his identity, the variance was deemed immaterial. *Davenport v. State*, 38 Ga. 184. But where an indictment gave the name of the injured person as "McKasky," "McKlaskey," and "McKloskey," and the proof showed its proper spelling to be "McCoskey," the conviction was set aside. *Black v. State*, 57 Ind. 109. So an indictment charging a trespass upon land in possession of A, is not supported by proof of a trespass upon land in possession of B. *State v. Sherrill*, 81 N. C. 550. And a charge that an affidavit was sworn to by J. N. P. is not supported by proof that J. P. signed it. *Pickens v. State*, 6 Ohio, 274. But a misnomer is fatal only when it is of a party whose existence is essential to the offense charged. *United States v. Howard*, 3 Sumn. 12.

A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense. Abbott, Trial Brief, § 680. Citing *inter alia* Earl, J., in *Harris v. People*, 64 N. Y. 148.

CHAPTER XXI.

VIEWING THE PREMISES.

- § 126. *View Regulating the Statute.*
- 127. *Theory of Mr. Wharton.*
- 128. *New York Code Provisions.*
- 129. *The Views of the New York Supreme Court.*
- 130. *Vigorous Opposition to the Views Last Cited.*

§ 126. **View Regulated by Statute.**—In criminal cases it appears that the jury are not permitted to view the premises where the crime was alleged to have been committed, unless it is authorized by statute. It was not permitted by the common law, because the jury could not or should not act on the case except upon information received by the evidence given in court. The question was presented in a murder trial in Massachusetts in 1829, and it was refused, though moved for by the prisoner and consented to by the attorney general. But on the second trial of the same case, the jury made the request that they be permitted to see the place of the murder, and both parties consented, and the court hesitated, but finally granted the request, "Because," the court said, "this course was without precedent, and if it should turn out to be incorrect, they had doubts whether they could hold the prisoner to his consent." And in this case, the court directed that no person should go with the jury except the officers having them in charge, and that no person should speak to them under penalty of a contempt. Plans were exhibited and explained to the jury in court, and they were permitted to take them with them to aid them in making the view. *Harris, Identification*, § 581; *Com. v. Knapp*, 9 Pick. 515, 20 Am. Dec. 491. See Mass. Rev. Stat. chap. 137, § 10.

The rule still holds that in criminal trials a view of the premises will seldom be permitted in the absence of statutory enactment authorizing it.

§ 127. **Theory of Mr. Wharton.**—Mr. Wharton says: "The practice which obtains in civil suits, in permitting the jury to visit the scene of the *res gestæ* is adopted in criminal issues whenever such a visit appears to the court important for the elucidation of

the evidence. The visit, however, should be jealously guarded, so as to exclude interference by third parties, and should be made under sworn officers. Such view may be granted after the judge has summed up the case. But where only a part of the jury visited the premises, and this after the case was committed to the jury for their final deliberation, this was held ground for a new trial. The visit also must be made in the presence of the accused, who is entitled to have all evidence received by the jury, taken in his presence." 3 Whart. Am. Crim. Law (7th ed.) p. 151, § 3160.

§ 128. **New York Code Provisions.**—When, in the opinion of the court, it is proper that the jury should view the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time. Cook's N. Y. Code, Crim. Proc. §§ 411, 412, citing Abbott, Trial Brief, 72-74, 26 Cent. L. J. 436; *People v. Johnson*, 110 N. Y. 143, 46 Hun, 673; *People v. Buddensiek*, 103 N. Y. 501, 57 Am. Rep. 766; *People v. Oyer & Terminer*, 36 Hun, 279, 3 N. Y. Crim. Rep. 215; *People v. Tyrrell*, 3 N. Y. Crim. Rep. 142; *People v. Palmer*, 43 Hun, 407, 5 N. Y. Crim. Rep. 106, disapproving *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211.

§ 129. **The Views of the New York Supreme Court.**—The vigorous contention that has serged around a very recent case admonishes me to illustrate this topic by a careful reference to what that case decides. The defendant had been indicted for an assault, and the substance of the charge was, that he had shot at and wounded one Ira Gray, at a saloon in the town of Catskill, N. Y. The trial was before the Green county oyer and terminer, and upon the application of the defendant's counsel, the county judge decided to allow a view of the premises by the jury, the judge and two officers of the court; but refused to allow the defendant or his counsel to accompany them. To this extraordinary ruling, the defendant's counsel naturally excepted. On a review had in

the general term, the opinion written by the presiding justice states the conclusions of the court in language that is apt to crystallize itself as the law governing such cases for the future. In view of the importance of this subject and the frequency with which the jury are asked to inspect the premises where crime is alleged to have been committed, I shall make an extended quotation from the opinion which was concurred in by *Judge Bockes*. The case will be found reported in 43 Hun, 397, under the title of *People v. Palmer*: "Was evidence given to the jury in this case, in the absence of the prisoner? One member of the court and two officers, went out from the court room. The two other members of the court and the prisoner and his counsel remained. The prisoner asked to accompany the jury, but this was refused. On returning, the member of the court who had gone with them stated that the jury had been up to the saloon; that the jury had not been allowed to communicate with one another, or hold any conversation with any person outside.

"The view of the place was itself evidence. It might be very important for the jury to know the size of the room. For instance, the defendant might have testified that the room was not more than ten feet long, and that the complainant, standing at one end, had struck with a stick the defendant, standing at the other. The jury may have been shown a room twenty feet long. And the length of the room would tend to discredit defendant's testimony, and would be material evidence whether the affray arose as defendant claimed.

"It is not an answer to this argument to say that there could be no doubt as to the size of the room by those who were allowed to see it; because the principle is not that no evidence, true or false, shall be so given. Hence, if the size and appearance of the room tends in any way to bear upon the question of the defendant's guilt or innocence, it is evidence, and must not be given to the jury in his absence. Bullet holes and splashes of blood might be in the room, and their position might bear strongly on the guilt or innocence of the prisoner. In this very case importance seems to have been attributed to the existence, or non-existence, of a bullet hole at a certain place in the room. If it would have been evidence to testify that there was such a bullet hole, then it was giving evidence to show to the jury the bullet hole itself.

"But again, either by words, or by gestures, or by the mere fact

that they were taken to a certain room by the officers and the member of the court, the jury were informed that that room was the place where the affray happened. Now, in the first place, this was unsworn evidence. No one stated to them under oath that that was the place of the affray. If on a trial any articles are to be exhibited to the jury, as, for instance, the clothes of a murdered man, the pistol of the murderer, and the like, before they can be given in evidence proof must be given in respect to them. Some one must, on oath, identify them as being what they are alleged to be. But there was no identification of the room shown to the jury. Did anyone testify before the jury, 'This is the saloon?' If so, then that evidence was given in defendant's absence; if not, then the room was shown without identification by sworn testimony. But, in the next place, the defendant had no opportunity of denying that the room shown was that saloon. What knowledge has he as to the place to which the jury were taken? They may have been taken to another room distant from the place of the affray. He has no means of knowing where they went.

"Suppose it were in dispute whether the affray occurred in one room or in another of a house. Can it be permitted that the jury shall be shown by two officers and one member of the court, in the defendant's absence, such room as they may think best to exhibit, and that the defendant shall thus be kept in ignorance what room was so exhibited? For, unless the defendant is present, he cannot know what room was exhibited. Could the alleged clothes of a murdered man, or the alleged pistol of the murderer, be exhibited to a jury at some place outside of the court room and in the absence of the defendant? If the defendant had been present, he might have denied that the room exhibited was the place of the affray. He might have called witnesses to show this. But, as it is, he cannot, because he does not know what room was exhibited. True the judge who accompanied them said, on his return, that they had been taken to the saloon of Hallenbeck Brothers. But how did the defendant know what place the judge and the two officers believed to be that saloon?"

So it has been held no error for the jury to make a view of the place where a felony is claimed to have been committed, under the order of the court and in charge of the sheriff, where the privilege is awarded the accused to accompany the jury, though he may refuse to attend the view. *Blythe v. State*, 47 Ohio St. 234.

§ 130. **Vigorous Opposition to the Views last Cited.**—The elucidations of the Palmer case will favorably impress the practitioner with the entire equity of the practice outlined, and it is certainly matter of surprise to find that the conclusions stated are under the judicial displeasure of several courts of high repute—notably that of Indiana. *Judge Elliott in Shular v. State*, 105 Ind. 294, 55 Am. Rep. 211, says: “It cannot be seriously doubted that evidence can only be delivered to a jury in a criminal case in open court, and, unless there is a judge, or judges, present, there can be no court. The statute does not intend that the judge shall accompany the jury on a tour of inspection; this is so obvious that discussion could not make it more plain. The jury are not, the statute commands, to be spoken to by any one save by the officer and the person appointed by the court, and they are forbidden to talk upon the subject of the trial. It is the duty of the jurors to view the premises, not to receive evidence, and nothing could be done by the defendant, or by his counsel, if they were present, so that their presence could not benefit him in any way, nor their absence prejudice him. The statute expressly provides who shall accompany the jury, and this express provision implies that all others shall be excluded from that right or privilege. It is quite clear from these considerations, that the statute does not intend that the defendant or the judge shall accompany the jury, and it is equally clear that the view obtained by the jury is not to be deemed evidence.

“Turning to the authorities we shall find our conclusion well supported. The statute of Kansas is substantially the same as ours, except that it does not require the consent of all the parties, and in a strongly reasoned case it was held that it was not error to send the jury, unaccompanied by the defendant, to view the premises where a burglary had been committed. *Brewer, J.*, by whom the opinion of the court was prepared, said, in speaking of the statute: ‘Nothing is said in it about the presence of the defendant, the attorneys, the officers of the court, or the judge. On the contrary, the language seems to imply that only the jury and officer in charge are to be present. The trial is not temporarily transferred from the court-house to the place of view. They are ‘to be conducted in a body’ ‘while thus absent.’ This means that the place of trial is unchanged, and that the jury, and the jury only, are temporarily removed therefrom. Just as when

the case is finally submitted to the jury, and they retire for deliberation, there is simply a temporary removal of the jury. The place of trial is unchanged. And whether the jury retire to the next room, or are taken to a building many blocks away, the effect is the same. In contemplation of law the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court remain in the court room.' *State v. Adams*, 20 Kan. 311.

"The keenest scrutiny will disclose no infirmity in this reasoning, and it is in close agreement with that of our own court. In *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545, this court overruled the case of *Evansville & C. S. L. R. Co. v. Cochran*, 10 Ind. 560, and adopted the views of the supreme court of Iowa, expressed in *Close v. Samm*, 27 Iowa, 503. That court, in speaking of a statute similar to ours, said: 'It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party.' The doctrine of *Close v. Samm*, *supra*, was again expressly approved in *Heady v. Vevay, M. S. & V. Transp. Co.* 52 Ind. 117, and it was said: 'It results that the impression made upon the minds of the jurors does not constitute a part of the evidence in the cause.' The case of *Jeffersonville, M. & I. R. Co. v. Bowen*, *supra*, was approved in *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322, and in *Indianapolis v. Scott*, 72 Ind. 196. In the case last cited it was said: 'Perhaps, strictly speaking, the jury had no right to do anything more than to view the premises, thereby to enable them the better to apply the evidence given upon the trial.' "

The jury are simply to gain assistance in applying the evidence, and not to find new evidence, by viewing the premises, and the rule best supported by reason, therefore, if not by the weight of authority, would seem to be that the presence of the accused is not necessary upon such an occasion. *Shular v. State*, 105 Ind. 290, 55 Am. Rep. 211.

Against the authority of this case must be set the opinion of Judge Barrett previously noticed.

CHAPTER XXII.

OPENING AND CLOSING THE CASE.

§ 131. *Object of.*

132. *Extent to which Counsel may go in Opening.*

133. *Duty of the Respective Counsel in Closing the Case.*

134. *Arguing from Facts not in Evidence.*

§ 131. **Object of.**—The object of an opening of a case to the jury is to state, briefly, the nature of the action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and the substance of the evidence to be adduced in its support. The counsel for the plaintiff, in opening, may also state the nature of the defense, if it appears upon the record. But further than this, he ought not to go, it seems. Each party should be confined to a legitimate and proper opening of his own case; the plaintiff's counsel to a statement of his cause of action, and the defendant's counsel to a statement of his answer to the plaintiff's case, and the evidence he proposes to give to sustain it; and in such opening should not comment, in the way of summing up, after the English manner, upon the plaintiff's evidence, any further than is essential to a proper understanding by the jury of the defendant's evidence. *Ayrault v. Chamberlain*, 33 Barb. 229.

§ 132. **Extent to which Counsel may go in Opening.**—The extent to which counsel may go, in opening a case to a jury, cannot, in the nature of things, be regulated by precise rule. The court may doubtless interfere in the interest of justice to restrain undue license on the part of counsel in addressing the jury. It might perhaps be its legal duty to interfere, in a criminal case, where a prosecuting officer, under the guise of opening the case to the jury, should seek to prejudice them by the recital of facts proposed to be proved, which would be manifestly incompetent, if offered in evidence. See *State v. Bateman*, 52 Iowa, 604; *State v. Meshek*, 61 Iowa, 316; *State v. Honig*, 78 Mo. 249; *Morales v. State*, 1 Tex. App. 494, 28 Am. Rep. 419; *People v. Kelley*, 94 N. Y. 526; *Kizer v. State*, 12 Lea, 564; *State v. Hoyt*, 47

Conn. 518, 36 Am. Rep. 89; *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771.

In *Scripps v. Reilly*, 38 Mich. 10, the opinion of *Mr. Justice Graves* ventilates the subject under review in the following language: "There is no doubt of the right of this court to revise in such a case as this. If the trial court may pursue any course it pleases in relation to the opening statement, if it may act independently of all control, then the idea of a rule to be prescribed by this court, under the constitution and legislative enactment, for its guidance and government, is preposterous and absurd. But the point is too plain for argument. This court will not revise such matters unless there is plain evidence of action amounting to what is called an abuse of discretion, and calculated to injuriously affect the legal rights of a party; and where such is the case, whether the result of accident, or inadvertence, or misconception, it will take cognizance. The error in this case was not cured, and is one subject to review, and is sufficient to require a reversal."

Since the decision of the case of *Scripps v. Reilly*, *supra*, an impression seems to have prevailed that the opening statements of counsel might be challenged step by step, and questions of relevancy and materiality of evidence raised and considered, and even argued at length, on counsel stating what he proposed to prove. Under this impression the practice of interrupting counsel, and demanding the judgment of the court on the competency of what he proposed to show, has in some cases been carried to extraordinary lengths, and elaborate arguments had been indulged in over the question whether counsel should be suffered to make certain statements of proposed evidence to the jury. Any such practice is a great abuse, and in a desperate criminal case might be resorted to for the purpose of defeating the ends of justice, by breaking the force of a connected statement of the case to the jury, and by prolonging the trial until the trouble and expense should dishearten the authorities, and result in a relaxation of effort for conviction. The cases must be rare in which counsel would be justified in interrupting the opening of his antagonist to raise questions of competency; and when he does so, the questions ought to be disposed of summarily, and without argument. A very clear case of abuse however would justify the court in interrupting and restricting the counsel's opening, (*Porter v. Throop*, 47 Mich. 313; *People v. Wilson*, 55 Mich. 506) for as a general

rule the interference of the court with counsel, when opening a case to a jury, is a matter of discretion, the exercise of which is not the subject of exception. *Walsh v. People*, 88 N. Y. 458.

§ 133. **Duty of the Respective Counsel in Closing the Case.**—The presiding judge should rigidly insist that the respective attorneys in a criminal case, should confine themselves to the facts developed by the evidence in summing up the case to the jury. Where, however, either side, through inadvertence, has alluded to an alleged state of facts not warranted by the evidence, it is proper to allow some reply—the extent of the explanation is largely within the discretion of the court. *People v. Mitchell*, 62 Cal. 411; *Cross v. State*, 68 Ala. 476; *Ferguson v. State*, 49 Ind. 33; *Greene v. State*, 17 Tex. App. 395; *Reeves v. State*, 84 Ind. 116.

A frequent illustration of the principles suggested in the foregoing text is the comment as to the failure of either side to place a person on the stand who has been regularly subpoenaed. This practice stands condemned; and the court should promptly suppress the least allusion to it. *State v. Jones*, 77 N. C. 520.

In *Blackman v. State*, 78 Ga. 596, the accused answering to an indictment for murder, before the impanelling of the jury made a motion for a postponement of the case on the ground of material testimony not then available. The parties were subpoenaed; but during the progress of the trial they were not examined. The prosecuting attorney in summing up the case to the jury commenting upon this fact began a sentence which the court promptly suppressed. On review, the appellate court reversed the judgment, holding that the trial court should not only have arrested the remark, but should have expressly instructed the jury to disregard it. The following suggestive language will the better indicate the juridicial view. "This defendant had made a motion to continue this case for the absence of certain witnesses, by whom he expected to prove that he was not near the scene of the homicide at the time it took place. These persons appeared, but he failed to introduce them. This motion was made before the jury was empanelled, and was probably made in writing, or, if made orally, there was no evidence of it before that jury; and it was certainly a very damaging circumstance to allow counsel to proceed and argue the guilt of the prisoner from his failure to produce these witnesses; and when the court's attention was called to

this subject, he should have promptly reproved the proceeding and admonished the jury that it was improper, and that they should give it no attention; but this he seems to have declined. Unless this was a case of circumstantial evidence so strong as to imperatively demand the finding the jury made, we can easily see how injury, and great injury, might have resulted to this defendant from such a course of proceeding. The defendant may be guilty, and may have been proven to be guilty, but his guilt could be established only by legal testimony properly introduced to the jury by witnesses with whom he was entitled to be confronted. Has the defendant had a fair trial with none but legal testimony before the jury? We think not; we cannot undertake to say what influence the circumstances improperly insisted upon in the argument may have had upon the jury; and a new trial is therefore granted."

Misstatements of the testimony in summing up, do not of themselves constitute error especially if promptly corrected by the court; nor do illogical inferences from the facts in evidence. Abbott, Trial Brief, § 713, citing *People v. Barnhart* 59 Cal. 381, 402; *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211. Nor is an erroneous statement of the evidence made by counsel to the jury, such error as will warrant the granting of a new trial. It would be strange if it was. It often occurs that counsel do not agree as to what the testimony is. Indeed, it rarely happens that they do. It is for the jury to determine that question. *People v. Barnhart*, *supra*.

The over nourished zeal of counsel displayed in attempts to secure conviction for crime, frequently calls for condemnation on the part of the appellate court, especially when in the closing argument to the jury the attorney for the state travels outside the evidence for his facts or indulges in truculent abuse of the accused. A suggestive illustration of this error is afforded in a case reported in Colorado in 1885. The defendant had appealed, alleging as reversible error comments by the state's attorney entirely unwarranted by the evidence, and this despite the admonition of the presiding judge. To such an extent had this error prevailed the record that the Attorney General, Hon. Theodore H. Thomas, refused to present the case and suggested that the court should set aside the verdict, which was accordingly done. *Smith v. People*, 8 Colo. 457.

In the course of an opinion delivered by the supreme court of

California in a very remarkable criminal case, this paragraph occurs which will be found apt in this connection.

The conduct of the assistant district attorney in proposing to read to the jury, during his argument, a paper which had not been introduced in evidence, and in asserting that it contained the record of defendant from the chief of police of Chicago, was inexcusable and reprehensible. We think, however, that, so far as the defendant's interests were concerned, no prejudice resulted from his violation of professional duty, for it was promptly rebuked by the court at the time, and the following instruction was thereafter given: "In weighing the evidence in this case, it is important that you should bear constantly in mind that statements of fact made by counsel, whether in examination of witnesses or in argument of the facts so stated, are not in proof, are not in evidence, and are to be discarded from your consideration." *People v. Bowers*, 79 Cal. 415.

§ 134. **Arguing from Facts not in Evidence.**—The paragraph last cited sufficiently indicates that it is error to allow the prosecuting attorney, against defendant's objections, to argue from facts not in evidence. But if defendant's counsel has, in summing up, commented on such facts, the court may permit a reply of like character. *Abbott*, Trial Brief, § 707, citing *People v. Mitchell*, 62 Cal. 411; *Cross v. State*, 68 Ala. 476; *Ferguson v. State*, 49 Ind. 33; *Greene v. State*, 17 Tex. App. 395; *Reeves v. State*, 84 Ind. 116; *People v. Bush*, 68 Cal. 623; *State v. Leabo*, 89 Mo. 247.

With these exceptions the authorities converge upon the proposition that counsel in their arguments to the jury are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case; any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed during the trial. *State v. Hannett*, 54 Vt. 83; *Garlitz v. State*, 71 Md. 293.

It would be strange, indeed, if counsel could make any sort of reckless assertion as to the law applicable to a case on trial, while arguing a question of evidence to the judge, and the latter was without authority to give expression to his full and emphatic dissent from the unwarrantable contention of counsel. This is certainly the right of a judge, and it may often be his imperative duty to exercise that right in a very positive and emphatic manner. *Garlitz v. State*, *supra*.

CHAPTER XXIII.

CHARGING THE JURY ON THE EVIDENCE.

- § 135. *Extreme Importance of the Subject.*
- 136. *Prominent Features of the Charge.*
- 137. *The Formula Usually Adopted.*
- 138. *Mistake, how Rectified.*
- 139. *Instances of Fatal Error.*
- 140. *Instructions Must be Regarded in their Entirety.*
- 141. *Court Cannot Assume any Fact Established when there is Conflict.*
- 142. *Instructions are Advisory in their Nature.*
- 143. *Parties may Submit Requests to Charge.*
- 144. *Instances of Harmless Error.*
- 145. *The Conclusion Reached as to Instructions.*
- 146. *Power to Direct a Verdict.*

§ 135. **Extreme Importance of the Subject.**—One of the most delicate functions pertaining to the judicial state, is exercised by the presiding judge in charging the jury on the evidence. A question of great importance is always presented where improper evidence has been admitted and the judge seeking to neutralize its effect, instructs the jury to disregard it. Instructions of this character are usually held to cure the defeat, unless it should clearly appear that the evidence erroneously admitted was of a seriously prejudicial character. In some jurisdictions it should be observed the judges are prohibited by the organic law from charging the jury with respect to matters of fact, and are confined to the testimony elicited in the case, and a statement of the law pertinent to the issue. The constitutions of Tennessee, California and Nevada have this effect. North Carolina, Georgia and Alabama have express legislation on this subject, but none of their provisions preclude the right to charge in respect to facts the counsel have alluded to in their opening address to the jury, but in support of which they have failed to produce evidence. It is equally pertinent for the court to admonish the jury as to the dangers of circumstantial evidence, and to explain the status of negative testimony. So, the court may, within certain limitations,

advise the jury as to the credibility of certain witnesses, taking care not to infringe upon the functions of the jury in estimating the degree of credit to be accorded to the testimony. He may inform the jury of their right to consider the general environment of the witness, his age, degree of intelligence, relationship to the party, apparent bias, or interest in the case. In short the charge should be strictly confined to the evidentiary matters as are fairly within the compass of the case. For a further exposition of this subject, the practitioner is referred to appropriate works on trial practice.

The frequency with which criminal convictions are reversed, owing to the evidence of some error in the judge's charge to the jury will abundantly excuse a somewhat protracted consideration of this branch of our subject. Great difficulty has arisen in many jurisdictions because of a slavish adherence to a formula given in section 200 of volume 1 of Greenleaf on Evidence. This instruction has been repeatedly condemned and condemned with emphasis. The Indiana supreme court, in *Finch v. Bergins*, 89 Ind. 360, reversed a judgment because the court below had given an instruction adopting the very words of Greenleaf in the section above mentioned. And Howk, J., in delivering the opinion of the court, said: "Of this section of Greenleaf's text, in a similar instruction in *Davis v. Hardy*, 76 Ind. 272, this court said: 'To give it in a charge, as written, would, in this state, be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is proper matter of argument that such evidence is subject to imperfection and discredit, for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say, as matter of law, in reference to the evidence of this kind, given in a particular case, that it is subject to much imperfection, or that "it frequently happens that the witness, by unintentionally altering a few expressions really used gives an effect to the statement completely at variance with what the party did say; or that, where 'the admission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature.' These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance.'"

So, in *Garfield v. State*, 74 Ind. 60, in commenting on an instruction transcribed, like the one above quoted, from 1 Green-

leaf on Evidence, this court said: "It is not every statement of the law found in a text-book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. . . . The instruction under consideration does not contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench. . . . They may well enter into the arguments of attorneys, . . . but the jury, not the judge, is the arbitrator of such contentions. . . . The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character."

In the case of *Woolen v. Whitacre*, 91 Ind. 502, it was said, by Hammond, J.: "The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness's testimony." And the rule above indicated in *Finch v. Bergins*, 89 Ind. 360, is supported by *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. State*, 56 Ind. 179; *Millner v. Eglin*, 64 Ind. 197, 31 Am. Rep. 121; *Jackman v. State*, 71 Ind. 149; *Works v. Stevens*, 76 Ind. 181.

§ 136. **Prominent Features of the Charge.**—In charging the jury it should be the aim of the court not to give undue prominence to any phase of fact which the testimony tends to establish. If there be apparent incompleteness or weakness of proof on any of the controverted issues in the cause, counsel will usually dwell on this in argument. But when parties ask a charge which isolates certain enumerated facts and circumstances, real or supposed, and invoke the instruction of the court on these, as circumstances especially to be weighed in the cause, the usual return is to give such facts and circumstances great, if not undue, prominence before the jury; and if given, the charge should be circumstances which point to the opposite conclusion. Less than this is apt to leave on the minds of the jury an impression that the convictions of the presiding judge incline in favor of the party such instructions are supposed to benefit; and the sup-

posed bias is none the less patent and apparent, even though, in giving such charge the court adds: "These circumstances are to be considered with the other evidence in the case." *Durrett v. State*, 62 Ala. 441; and see *Castro v. Illies*, 22 Tex. 503, 73 Am. Dec. 277; *McCartney v. McMullen*, 38 Ill. 240; *Blankenship v. Douglas*, 26 Tex. 230; *State v. Homes*, 17 Mo. 379, 57 Am. Dec. 269; *Carroll v. Paul*, 16 Mo. 241; *State v. Ward*, 19 Nev. 297.

In charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact. *People v. O'Neill*, 112 N. Y. 363; *People v. McInerney*, 5 N. Y. Crim. Rep. 47; *People v. Carpenter*, 4 N. Y. Crim. Rep. 39.

Comments upon the testimony so long as the judge leaves all the question of fact to the jury and instructs them that they are the sole judges of matters of fact are not subjects of legal exception. It is desirable that the court should refrain as far as possible from saying anything to the jury which may influence them either way, in passing upon controverted questions of fact, and perhaps comments on the evidence might be carried so far as to afford ground for assigning error. *Sindram v. People*, 88 N. Y. 196.

So it is said that the court is the judge of the law, and the jury of the fact; that is, it is the duty of the jury "to be governed by the instructions of the court as to all legal questions involved in such general verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions, whether of law or fact." *Duffy v. People*, 26 N. Y. 588.

The general question is very elaborately and exhaustively considered in *Pierce v. State*, 13 N. H. 536, and here also the conclusion is reached that although the jury in criminal cases have the power to disregard the charge of the court, it is, nevertheless, their duty to receive it as the law of the case. *Habersham v. State*, 56 Ga. 61, note.

§ 137. **The Formula Usually Adopted.**—The formula usually adopted by the trial court in charging the jury is, "if from the

evidence the jury believe, etc.," and there is no merit in the contention that such a formula should be qualified by the addition of the words "to a moral certainty" or of some equivalent language. If counsel for the defendant desired greater particularity, it is within his province to ask the court to explain what is meant by the term "belief," or rather that what we term belief in a criminal case, when applied to the guilt of a defendant, is a conviction of the mind to a moral certainty and beyond a reasonable doubt. *People v. Sheldon*, 68 Cal. 434. See also *Cox v. People*, 109 Ill. 457.

Judges may state the testimony and declare the law, but must not express an opinion upon the weight of the evidence. We are unable to see how the mere statement that there is a conflict in the evidence in certain respects can be regarded as the expression of an opinion upon the weight of the evidence, or a charge with respect to matters of fact. In *People v. Casey*, 65 Cal. 261, the court instructed the jury that "the testimony in the case shows that the defendant's," etc. This was held to be erroneous and the court said: "To state the testimony is one thing. To declare what it shows is another and very different thing. It is for the jury exclusively to determine what the testimony shows." *People v. Flynn*, 73 Cal. 511.

In *State v. Parker*, 61 N. C. 475, Pearson, *Ch. J.*, said that all that the law requires is, that the jury shall be clearly instructed that unless, after due consideration of all the evidence, they are "fully satisfied," or "entirely convinced," or "satisfied beyond a reasonable doubt," of the guilt of the prisoner, it is their duty to acquit, and every attempt on the part of the court to lay down a "formula," for the instruction of the jury by which to "gauge" the degrees of conviction has resulted in no good. *State v. Sears*, 61 N. C. 146; *State v. Know*, 61 N. C. 312; *State v. Gee*, 92 N. C. 756.

In cases of homicide it is reversible error to charge that the fact of the killing being admitted by the accused, the burden of proof is on him to show that it is not murder. The frequency with which this statement creeps in to the judge's charge, admonishes us to specific mention of this error in this immediate connection.

Wilson v. People, 4 Park. Crim. Rep. 619; *People v. McCann*, 16 N. Y. 66, 69 Am. Dec. 642; *Com. v. Hawkins*, 3 Gray, 463; *People v. Robinson*, 2 Park. Crim. Rep. 235; 1 Hale, P. C. 425;

4 Bl. Com. 198; 3 Coke, Inst. 47; 1 East, P. C. 215; *Penn v. McFall*, Add. Rep. 257; 1 Russell, Crimes, 482, *note*; *Com. v. Gross*, 1 Ashm. 281; *Com. v. Mulatto Bob*, 4 U.S. 4 Dall. 145, 1 L. ed. 776; *Coffee v. State*, 3 Yerg. 283, 24 Am. Dec. 570; *Dale v. State*, 10 Yerg. 551; *Dains v. State*, 2 Humph. 439; *Darry v. People*, 2 Park. Crim. Rep. 606; *Fitzgerrold v. People*, 37 N. Y. 413; 1 Russell, Crimes, 571; *Sullivan v. People*, 1 Park. Crim. Rep. 347; *People v. Clark*, 7 N. Y. 385; *People v. Sullivan*, 7 N. Y. 396; *People v. Austin*, 1 Park. Crim. Rep. 154; *People v. Johnson*, 1 Park. Crim. Rep. 291; *Darry v. People*, 10 N. Y. 136; *Maher v. People*, 10 Mich. 217; *People v. Perry*, 8 Abb. Pr. N. S. 34; *Whiteford v. Com.* 6 Rand. (Va.) 725; *Hill v. Com.* 2 Gratt. 594; Stark. Ev. 377; *People v. Divine*, 1 Edm. Sel. Cas. 594; *Wynehamer v. People*, 13 N. Y. 378; *People v. Enoch*, 13 Wend. 159; *Com. v. Webster*, 5 Cush. 305; *Com. v. Gardner*, 11 Gray, 438; *Fouts v. State*, 8 Ohio St. 98; *Anthony v. State*, 1 Meigs, 265; *Hastings v. Bangor House Proprs.* 18 Me. 436; *Chrisman v. Gregory*, 4 B. Mon. 474.

The Oregon law provides that the jury are to be instructed by the court on all proper occasions:

(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

(2) That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;

(3) That a witness false in one part of his testimony is to be distrusted in others;

(4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

(5) That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence; that in criminal cases guilt shall be established beyond reasonable doubt;

(6) That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore,

(7) That if the weaker and less satisfactory evidence is offered

when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. Hill's Annotated Law of Oregon, § 845.

§ 138. **Mistake how Rectified.**—When upon a criminal trial the judge in charging the jury lays down erroneous propositions, but, upon his attention being called thereto by objections, corrects the misdirections and lays down the correct rule, no error is presented for review. But to obviate an erroneous instruction upon a material point the withdrawal must be absolute and in such explicit terms as to preclude the inference that the jury might have been influenced thereby. *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *Eggle v. People*, 56 N. Y. 642; *Chapman v. Erie R. Co.* 55 N. Y. 579.

§ 139. **Instances of Fatal Error.**—In the case of *Castleman v. Sherry*, 42 Tex. 59, the court said: "The charge is further objectionable as being upon the weight of the evidence, when the court tells the jury that evidence of the admissions of a party is regarded as dangerous and liable to abuse, etc. Such expressions as these, found in every treatise on evidence, are to be regarded as matters of argument rather than rules of evidence having the force of law, upon which the court should instruct a jury." See also *Mauro v. Platt*, 62 Ill. 450.

It is fatal error to instruct the jury that evidence of verbal admissions made some time ago are subject to imperfection and mistake, and should be cautiously received, because the party may not have expressed his own meaning, or may have been misunderstood, and the witness may not give the exact language, and thereby change the meaning; but admissions deliberately made against interest, are well understood, are entitled to consideration; nevertheless the jury are the exclusive judges of the weight of the evidence. *Shorb v. Kinzie*, 100 Ind. 429.

A charge which instructs the jury that, if the evidence is susceptible of two reasonable constructions, one of which is consistent with the defendant's innocence, it is their duty to adopt that construction, is calculated to confuse and mislead, and is properly refused. *Gibson v. State*, 91 Ala. 64.

In *Densmore v. State*, 67 Ind. 308, the court charged the jury that "what is commonly called common sense is perhaps the jurors' best guide in those particulars." This was held erroneous, the court saying: "Now, while common sense is a very desirable

and admirable quality in a man, and exceedingly useful in all the practical affairs of life, including the duties of jurors, we do not see how it can be a better guide to them in the discharge of those duties than the rules of law. Indeed, the rules of law are generally the condensed common sense of ages. But the common sense of twelve jurors would not be likely to be all alike. What one might regard as the common sense view of a question, another might think utterly destitute of common sense. If each juror were to act upon his common sense instead of the rules of law, there would be as many different opinions as there were jurors. With each juror acting upon his own common sense instead of the rules of law, we might expect a verdict in accordance with the law 'when everlasting fate shall yield to fickle chance and chaos judge the strife.' " To the same effect, *Wright v. State*, 69 Ind. 165; *Anderson v. State*, 41 Wis. 430, 434; *Meyers v. Com.* 83 Pa. 142; *People v. Ah Sing*, 51 Cal. 372.

A charge which selects and gives undue prominence to particular portions of the evidence, to the exclusion of other material portions, is properly refused; as, where it asserts that the failure to prove any motive for the crime, or the proof of friendly relations between the defendant and the deceased, "is a strong circumstance in favor of the defendant's innocence." *Goley v. State*, 85 Ala. 333.

So it is error to refuse to charge that, if there is apparent conflict in the evidence, it is the duty of the jury to reconcile it if they can, and not impute perjury to any witness. *Rickerson v. State*, 78 Ga. 15.

It is error for the court to refuse to charge the jury that if the evidence shows that at the time of committing the act the accused was in a state of intoxication, the jury must consider that fact, and that condition as bearing upon the question of premeditation, and showing the absence of deliberation in the act. *Haile v. State*, 11 Humph. 154; *Com. v. Jones*, 1 Leigh, 598; *Pirtle v. State*, 9 Humph. 663; *Sivan v. State*, 4 Humph. 136; *Boswell v. Com.* 20 Gratt. 860; *Lancaster v. State*, 2 Lea, 575; *Schlenker v. State*, 9 Neb. 241; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Belencia*, 21 Cal. 544; *Ferrell v. State*, 43 Tex. 503; *Colbath v. State*, 2 Tex. App. 391; Whart. Homicide, § 587; *Com. v. Dorsey*, 103 Mass. 412; *Kelly v. Com.* 1 Grant Cas. 484; *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414; *Jones v. Com.* 75

Pa. 403; *State v. Johnson*, 40 Conn. 136; *People v. Williams*, 43 Cal. 344; *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558; *People v. Ferris*, 55 Cal. 588; *People v. Harris*, 29 Cal. 678; *People v. Batting*, 49 How. Pr. 392; *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556.

A general rule of wide acceptance is to the effect that a court should not give a jury such instructions as to prevent them from exercising their own judgment and deciding for themselves. *New York F. Ins. Co. v. Walden*, 12 Johns. 513; *Bulkeley v. Keteltas*, 4 Sandf. 450, 6 N. Y. 384; *People v. Wiley*, 3 Hill, 194; *People v. Quin*, 1 Park. Crim. Rep. 340; *Pfomer v. People*, 4 Park. Crim. Rep. 588; *Breen v. People*, 4 Park. Crim. Rep. 380; *Fitzgerrold v. People*, 37 N. Y. 413.

In a larceny case an instruction invades the jury's province which charges that if the defendant denied having in his possession goods which had been stolen, and such goods were found in his possession immediately after his denial, and he failed to explain such possession, these facts were sufficient to sustain a conviction. *Blankenship v. State*, 55 Ark. 244.

§ 140. **Instructions Must be Regarded in their Entirety.**—Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. *Kendall v. Brown*, 86 Ill. 387; *Skiles v. Caruthers*, 88 Ill. 458.

The supreme court of Iowa has said: "It is usually not practicable, in any one instruction, to present all the limitations and restrictions of which it is susceptible. These very frequently must be presented in other and distinct portions of the charge. The charge must be taken together, and if, when so considered, it fairly presents the law and is not liable to misapprehension nor calculated to mislead, a cause should not be reversed, simply because some one of the instructions may lay down the law without sufficient qualification." *Rice v. Des Moines*, 40 Iowa, 638.

The same court held in a criminal case, where the indictment was for murder, that "instructions are all to be considered and construed together," and that an omission to state the law fully in one instruction, when the omission is fully supplied in another, does not constitute error. *State v. Maloy*, 44 Iowa, 104.

The supreme court of California said, in a criminal case:

"While some of the instructions are perhaps subject to criticism and may not state the law with precise accuracy, yet, taken as a whole, they were substantially correct and could not have misled the jury to the prejudice of the defendant." *People v. Cleveland*, 49 Cal. 577. The principle here announced, that an instruction, which is general in its character, may be limited or qualified by other instructions in the series, does not contravene the rule, that in a criminal case "material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction." Whart. Crim. Pl. & Pr. (8th ed.) § 793. Notwithstanding this, as was said in the case of *McDermott v. State*, 89 Ind. 187, "The instruction should not be dissected and separated. It must be considered as a whole. If an instruction may be separated into fractional parts, so that one portion may not limit and qualify, or extend and explain another portion, it will be difficult, if not impossible, to form an instruction that will stand such an examination and criticism. In thus separating into parts, the sense may be twisted and tortured so that the most correct may appear to be the most faulty instruction." See also *Nicoles v. Calvert*, 96 Ind. 316; *Wright v. Fansler*, 90 Ind. 492; *Story v. State*, 99 Ind. 413.

§ 141. **Court Cannot Assume any Fact Established when there is Conflict.**—It is the settled law that where there is any conflict in the evidence as to the existence of any fact in the case, the court can not, in charging the jury, assume that such fact has, or has not been established. This would be an invasion of the province of the jury. This is the ruling in the case of *Finch v. Bergins*, 89 Ind. 360. But where the existence of a fact is established by the evidence without any conflict, contradiction or dispute whatever, it is not an available error for the court to instruct the jury that there is evidence tending to prove such fact. See the following authorities: *Carver v. Carver*, 97 Ind. 497; *Hazard v. Citizens State Bank*, 72 Ind. 130; *Moss v. Witness Printing Co.* 64 Ind. 125; *Dodge v. Gaylord*, 53 Ind. 365; *American Ins. Co. of Chicago v. Butler*, 70 Ind. 1; *Adams v. Kennedy*, 90 Ind. 318; *Steinmetz v. Wingate*, 42 Ind. 574; *Hynds v. Hays*, 25 Ind. 31; *Porter v. Millard*, 18 Ind. 502; *State Bank v. Hays*, 3 Ind. 400; *Crookshank v. Kellogg*, 8 Blackf. 256; *Nixon v. Brown*, 4 Blackf. 157; *Governor v. Shelby*, 2 Blackf. 26; *Hughes v. Monty*, 24 Iowa, 499; *Miller v. Kirby*, 74 Ill. 242; *Heartt v. Rhodes*, 66 Ill. 351; *Hanrahan v. People*, 91 Ill. 142.

Judge Thompson, in his work on "Charging the Jury," at page 74, says: "But whilst it is improper for the judge to assume the existence of a fact in issue, yet, where the evidence is clear and conclusive as to the existence of the particular fact, and there is no evidence to the contrary, an instruction, assuming it as true, will not work a reversal of the judgment." This is a very good summary of the doctrine of the cases above cited. *Koerner v. State*, 98 Ind. 7.

In the case of *Sindram v. People*, 88 N. Y. 196, *Judge Rapallo* said: "Comments upon the testimony, so long as the judge leaves all the questions of fact to the jury, and instructs them that the sole judges of matters of fact, are not the subjects of legal exception. It is desirable that the court should refrain, as far as possible, from saying anything to the jury which may influence them either way in passing upon controverted questions of fact, and perhaps comments on the evidence might be carried so far as to afford ground for assigning error. But in the present case, whenever its attention was called by the prisoner's counsel to any part of the charge which he considered as an infringement upon the province of the jury, the court promptly and clearly withdrew the remarks objected to, and emphatically reminded the jury that they alone had the right to determine the facts."

§ 142. **Instructions are Advisory in their Nature.**—The jury being the judges of the law and the facts in criminal cases, the instructions of the court are merely advisory, and not obligatory. *Nuzum v. State*, 88 Ind. 599; *McDonald v. State*, 63 Ind. 544; *Keiser v. State*, 83 Ind. 234; *Fowler v. State*, 85 Ind. 538.

In the case of *State v. Banks*, 48 Ind. 197, the court instructed the jury, under the facts, to return a verdict of not guilty. It is said by the supreme court, in affirmance of that case, that, "A court, in charging a jury, has no right to assume the guilt of the accused, or that a fact has or has not been proved, or to express any opinion or manifest a leaning upon evidence which would be submitted to the jury; but when there is no evidence, or none upon a particular point, upon which a conviction could be based, the court has a right to say so, and direct the jury to find the defendant not guilty."

On a trial for murder, where the evidence against the defendant is circumstantial, the jury should be advised that casual state-

ments made by the defendant, in the course of ordinary conversation, concerning the death of the deceased, should be considered with great caution. *State v. Moxley*, 102 Mo. 374.

So where the evidence not only contained no suggestion of any provocation, or other mitigating circumstances, or that the killing was accidental, but affirmatively negated any such hypothesis, it is not error for the court to advise the jury that no degree of manslaughter, and no degree of murder, except murder in the first degree, was applicable to the case; that, if they were satisfied beyond a reasonable doubt that the defendant killed the deceased with a premeditated design to effect his death, they must find him guilty of murder in the first degree; but that, if they were not so satisfied beyond a reasonable doubt, they must acquit him. *State v. Lentz*, 45 Minn. 177.

§ 143. **Parties may Submit Requests to Charge.**—If evidence has been received as proper for one purpose, although not for another—for instance, evidence of another offense, received to show knowledge or intent—the party affected has a right to an instruction, that the jury must consider it only as bearing on the question in reference to which it was properly received. *Abbott*, Trial Brief, § 791, citing *Therasson v. People*, 82 N. Y. 238; *People v. Gray*, 66 Cal. 271; *Jones v. State*, 14 Tex. App. 85; *Holmes v. State*, 20 Tex. App. 509; *Coleman v. People*, 55 N. Y. 81; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

When the instructions of the court are unexceptionable as to the offense charged and for which the prisoner is on trial, and such instructions cover every element of the crime, and correct rules for the proper application of the evidence, it is not strictly the right of a prisoner to ask instructions upon a hypothetical case, based upon other facts. *Slatterly v. People*, 58 N. Y. 354.

Where the jury have been properly instructed, the judge may refuse to entertain any further application to charge them (*Moody v. Osgood*, 54 N. Y. 488) and he is under no obligation to submit abstract propositions of law for their consideration.

“The refusal to charge the requests, in respect to the credibility of the two detectives, or informers, was not error, for the reason that one of the requests was to charge that they were accomplices, and the other assumed that they were such.” The testimony of such witnesses should be viewed with caution,—and even distrust; but it is, after all, a question for the jury, whether they shall be believed. *Com. v. Downing*, 4 Gray, 29.

A judge is not bound to repeat his charge, nor is he bound to adopt the exact language of counsel in their request to charge. *Tucker v. Ely*, 37 Hun, 565; *O'Connell v. People*, 87 N. Y. 377; *Moett v. People*, 85 N. Y. 373; *Raymond v. Richmond*, 88 N. Y. 671. And he may properly refuse to give instructions asked after the argument has commenced. *Surber v. State*, 99 Ind. 71.

§ 144. **Instances of Harmless Error.**—The rule is firmly established that if, upon considering all the instructions together, it fairly appears that the law was stated with substantial accuracy, so that the jury could not have been misled, no ground for reversal is presented, even though a particular instruction, or some detached portion thereof, may not be precisely accurate. *Cooper v. State*, 120 Ind. 377.

The same reasoning that applies to a harmless error in an instruction is equally available as regards any error that is manifestly without prejudice to the accused. All arguments upon this proposition converge upon the same conclusion. *Armstrong v. Tait*, 8 Ala. 635; *O'Callaghan v. Bode*, 84 Cal. 489; *Klimple v. Boelter*, 44 Minn. 172; *West v. Camden*, 135 U. S. 507, 34 L. ed. 254; *Hogshead v. State*, 120 Ind. 327; *Cooper v. State*, *supra*; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Staser v. Hogan*, 120 Ind. 207; *Walters v. Jordan*, 35 N. C. 361; *Atkinson v. Dailey*, 107 Ill. 117; *Copeland v. Koontz*, 125 Ind. 126; *Bosley v. Chesapeake Ins. Co.* 3 Gill & J. 450; *Jones v. Angell*, 95 Ind. 376; *Johnson v. Evans*, 8 Gill, 155, *Ricketts v. Harvey*, 106 Ind. 564; *Sawyer v. Chicago & N. W. R. Co.* 22 Wis. 403; *Zachary v. Pace*, 9 Ark. 212, 47 Am. Dec. 744; *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. 379; *Worley v. Moore*, 97 Ind. 15.

§ 145. **The Conclusion Reached as to Instructions.**—Summarizing the conclusions of eminent authority, we may appropriately refer to the case of *Com. v. Selfridge*, Har. & T. 2, decided in 1806. *Ch. J. Parker* in summing up the evidence and instructing the jury, makes use of the following expressive language:

"I hold the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony, in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of an advocate. All which I conceive necessary or proper for one to do in this part of

the cause is, to call your attention to points of facts on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion of the subject is."

Eighty years later the same principle was reasserted by the supreme court of Mississippi in the following language: "It has been correctly laid down, by authority, that the court is bound to instruct the jury on all the points pertinent to the case. The responsibility of a correct announcement of the law is upon the court. It would seem to follow, therefore, if the requests to charge do not, in the opinion of the judge, correctly state the law applicable to the case, that he ought to so modify them as to make them conform to the law." *White v. State*, 52 Miss. 216.

§ 146. **Power to Direct a Verdict.**—The trial court has not the power to direct a verdict of guilty, even though the evidence of guilt be overwhelming, and the question of guilt or innocence depends wholly upon a question of law. The contrary, however, was held in a case where the facts constituting guilt were undisputed. On the other hand, the trial being in progress, the court cannot discharge the prisoner on the ground that the *corpus delicti* has not been proved; but a question of law only being presented, may instruct the jury to acquit, and a refusal so to instruct is error. But such an instruction should only be given where there is no evidence tending to prove the offense charged. In the Federal courts it is not the practice to direct a specific verdict, but rather to instruct the jury upon the law as to the competency of the evidence, and leave it to them to find their verdict accordingly. Rapalje, Crim. Proc. § 376, citing *Tucker v. State*, 57 Ga. 503; *United States v. Taylor*, 3 McCrary, 500, 3 Crim. L. Mag. 552; *United States v. Anthony*, 11 Blatchf. 200; *People v. Bennett*, 49 N. Y. 137; *State v. Warner*, 74 Mo. 83; *United States v. Walsh*, 22 Fed. Rep. 644.

Where, on the trial of an indictment, the facts in evidence are admitted or undisputed, and are insufficient to establish that the offense charged has been committed by the defendant, it is the duty of the court, on request therefor, to direct the jury to return a verdict of not guilty. *Com. v. Ruddie*, 142 Pa. 144.

CHAPTER XXIV.

EVIDENCE OF PREJUDICIAL JURY.

- § 147. *Accused is Entitled to Fair and Impartial Jury.*
- 148. *Mere Abstract Opinion of Guilt no Ground for Objection.*
- 149. *The Test of Competency.*
- 150. *When the Objection Should be Regarded.*
- 151. *Irregularity of the Grand Jury May be Shown.*
- 152. *Evidence in Support of Verdict.*

§ 147. **Accused is Entitled to Fair and Impartial Jury.**—A frequent objection obtruded, upon the trial of a criminal case, relates to the prejudice or bias of the individual members composing the jury. Evidence is produced which tends to establish the fact that some individual who sat in the jury box approached the consideration of the case under circumstances that prevented him from being influenced solely by the evidence adduced. This objection is an important one, especially where the life of the accused is concerned; as no privilege is more important to the citizen, than that of having the issues made, tried and determined by a fair, competent and disinterested jury, standing impartially between himself and his accusers.

§ 148. **Mere Abstract Opinion of Guilt no Ground for Objection.**—This entire subject has received the critical attention of the New York court of appeals in a very recent case; and *Chief Justice* Ruger in delivering the opinion of the court has left little that can be said upon the subject. In *People v. Carpenter*, 102 N. Y. 238, the evidence shows that one of the jurymen testifying as to his competency to sit in the case, said: "My mind is practically clear and unbiased as between the people and this prisoner. I have no opinion now as to the guilt or innocence of the defendant. If the defense of insanity was interposed, I would have a prejudice against it. My answer only implies that I believe the defense of insanity has been misused and abused and I am not prejudiced against a person who is insane. It is a prejudice against sham defenses. I don't think that feeling would control or influence my judgment against the defense of insanity." The

juror was held competent. *Com. v. Buzzell*, 16 Pick. 160; *Com. v. Porter*, 4 Gray, 423.

The existence of a mere abstract opinion in which no element of malice or unreasoning prejudice enters, can certainly form no just ground for the rejection of a juror, even where he admits that the defense of insanity, owing to its gross abuse, would raise some feeling of hostility to the accused. If the evidence shows, that notwithstanding this feeling against this defense, the juror can still be guided to his verdict by the testimony in the case, uninfluenced by any feeling of bias, he is competent as a juror.

The end sought by the common law was to secure a panel that would impartially hear the evidence and render a verdict thereon uninfluenced by any extraneous considerations whatever. If the person proposed as a juror can and will do this, the entire purpose is accomplished. To secure this the statute requires that he shall make oath that he can do this, irrespective of any previous or existing opinion or impression. Not satisfied that this may be safely relied upon, on account of the difficulty of determining by a person having an opinion or impression how far he may be unconsciously influenced thereby, the statute goes further and provides that the court shall be satisfied that the person proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. Surely this latter provision, if rightly and intelligently administered by a competent court, will afford protection to the accused from injury from a partial jury. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 493.

On a question of actual bias even slight evidence is admissible. *People v. Bodine*, 1 Denio, 281, 307.

The object of the inquiry is the state of mind of the proposed juror, and that state must be such, in order to make him competent, as will lead to the inference that he will act with entire impartiality. *May v. Elam*, 27 Iowa, 365. The leading and most recent case is *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. Rep. 194.

§ 149. The Test of Competency.—The test of the competency of a juror in a capital case is his ability to render a verdict upon the evidence, and upon the evidence alone, uninfluenced by any opinion which he may have previously formed from newspaper or other reports of the crime. *Rizzolo v. Com.* 126 Pa. 54. That case followed directly in the line of *Staup v. Com.* 74 Pa.

458; *O'Mara v. Com.* 75 Pa. 424; *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420; *Allison v. Com.* 99 Pa. 32; *Clark v. Com.* 123 Pa. 558.

In *Allison v. Com.* 99 Pa. 32, it was held that where a juror in a criminal case has formed an opinion from hearing or reading the evidence upon a former trial, he is incompetent, even if his opinion thus formed does not come up to the standard of a fixed opinion. But this rule does not apply where the juror has heard or read only fragmentary portions of the evidence; on the contrary, his opinion must have been formed upon all the evidence in a former trial against the same prisoner, before the disqualification referred to attaches; and it was distinctly ruled that the hearing or reading the evidence upon a preliminary examination before a coroner or committing magistrate, was not a trial within the meaning of this rule. We need not discuss this question further. It is worn threadbare, and the law ought now to be well understood. *Com. v. Taylor*, 129 Pa. 534.

In *Staup v. Com. supra*, it was laid down as a primary rule, that a juror who had read the evidence taken on a former trial and had formed an opinion from what he read that was fixed, deliberately formed and still entertained, was not a competent juror. In *O'Mara v. Com. supra*, the rule stated was affirmed with the addition that where the juror's "opinion of the prisoner's guilt has become a fixed belief, it would be wrong to receive him." *Ortwein v. Com. supra*, followed, affirming all that was decided in the two former cases. The court then formulated and laid down the rules touching the competency of jurors in *Allison v. Com. supra*, and ruled: "Where the juror entertains a fixed or deliberate opinion, no matter how formed, of the prisoner's guilt, he is incompetent, and his belief that he can try the prisoner impartially will not remove the disqualification."

In our present state of society, all that can be required of a juror, to render him competent, is, that he shall be without bias, or prejudice for or against the accused, and that his mind is free to hear and impartially consider the evidence, and to render a verdict thereon without regard to any former opinion or impression existing in his mind, formed upon rumor or newspaper reports. Whenever it is shown that such is the state of mind of the juror, he should be held to be competent; and such is the rule as laid down in *Waters v. State*, 51 Md. 430. In that case it was

said "that the opinion which should exclude a juror must be a fixed and deliberate one, partaking in fact of the nature of a prejudgment."

§ 150. **When the Objection Should be Regarded.**—Where the evidence clearly shows that the objection raised is vital in its character, and is not referred to a mere matter of trivialty or detail, but strikes at the foundation of the organization of the jury panel as where the proof elicited shows the facts, that too many or too few persons composed the jury, or that the public officials failed to perform their duty by omitting to make any selection or list of names as is required by law; or to properly draw or summon any or all of the panel from the names selected—such evidence discloses fatal defect in the composition of the jury, and is pertinent as showing the invalidity of any indictment found by them. *Barney v. State*, 12 Smedes & M. 68; *Stokes v. State*, 24 Miss. 621; *Finley v. State*, 61 Ala. 201; *Fitzgerald v. State*, 4 Wis. 395; *Doyle v. State*, 17 Ohio, 222; *Low's Case*, 4 Me. 439; *People v. King*, 2 Cal. 98; *McCloskey v. People*, 5 Park. Crim. Rep. 308; *State v. Bryce*, 11 S. C. 342; *People v. Thurston*, 5 Cal. 69; *Com. v. Cherry*, 2 Va. Cas. 20; *Com. v. St. Clair*, 1 Gratt. 556; *State v. Griffice*, 74 N. C. 316; *State v. McNamara*, 3 Nev. 71; *Clare v. State*, 30 Md. 164; *Portis v. State*, 23 Miss. 578; *Brown v. Com.* 73 Pa. 321; *People v. Earnest*, 45 Cal. 29; *State v. Harden*, 3 Rich. L. 533; *Davis v. State*, 46 Ala. 80; *Finnegan v. State*, 57 Ga. 427; *O'Byrnes v. State*, 51 Ala. 25; *Clinton v. Englebrecht*, 80 U. S. 13 Wall. 434, 20 L. ed. 659; *Com. v. Norfolk County Ct. of Sessions*, 5 Mass. 435; *Nicholls v. State*, 5 N. J. L. 539; *Chase v. State*, 20 N. J. L. 218; *State v. Williams*, 1 Rich. L. 188; *People v. McKay*, 18 Johns. 212; *State v. Lightbody*, 38 Me. 200; *Rawls v. State*, 8 Smedes & M. 599; *Com. v. Parker*, 2 Pick. 550; *Eaton v. Com.* 6 Binn. 447; *State v. Cantrell*, 21 Ark. 127; *McElhanon v. People*, 92 Ill. 369; *State v. Symonds*, 36 Me. 128; *United States v. Hammond*, 2 Woods C. C. 197; *State v. Rockafellow*, 6 N. J. L. 405; *Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265; *State v. Foster*, 9 Tex. 65; *Jackson v. State*, 11 Tex. 261; *State v. Davis*, 12 R. I. 492, 34 Am. Rep. 704; 1 Chitty, Crim. Law, 307; 2 Hawk. P. C. 307; 2 Hale, P. C. 155; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567.

In criminal cases and especially those involving such a moment-

ous result as the life of the accused, it is quite essential that no irregularity on the part of the jury is permitted which can possibly prejudice him, and in such a case a new trial will ordinarily be granted unless it clearly appears that it did not affect the verdict. *Eastwood v. People*, 3 Park. Crim. Rep. 25; *People v. Johnson*, 46 Hun, 667.

§ 151. **Irregularity of the Grand Jury may be Shown.**—

The exclusionary rules that formerly obtained as to the inviolability of grand jury secrets, have entirely disappeared. It is now well settled, that when evidence of a grand juror as to proceedings before that body becomes material to the administration of justice, such evidence will be allowed and indeed demanded. *State v. Broughton*, 29 N. C. 96; *State v. Wood*, 53 N. H. 484; *Burnham v. Hatfield*, 5 Blackf. 21; *Little v. Com.* 25 Gratt. 921; *United States v. Charles*, 2 Cranch, C. C. 76; *Com. v. Hill*, 11 Cush. 137; *People v. Young*, 31 Cal. 563; *Burdick v. Hunt*, 43 Ind. 381; *Com. v. Mead*, 12 Gray, 167, 71 Am. Dec. 741.

Numerous instances in our criminal annals disclose an attempt on the part of the accused to vitiate the indictment against him, by introducing evidence having a tendency to affect the constitutionality of the organization under which the functions of the jury are supposed to derive their force. And wherever evidence showing this informality is of a direct and convincing kind a question at once arises of the utmost gravity. Because of the far reaching consequences of such evidence, whenever it is properly introduced, the question under review is thought to merit the somewhat extended examination it receives in this immediate connection.

When old and valid laws still operative for the obtainment of a grand jury are disregarded, and a new, unlawful and forbidden enactment is obeyed in its selection, what possible vitality of life can an organization thus set on foot obtain? See in this connection the opinion of the chancellor in *People v. White*, 24 Wend. 539, 540, 541, 542, as to the distinction between *de facto* officers of a tribunal "duly organized," and of the "*de facto* officers of an unconstitutional and therefore illegally organized court;" also, *Hildreth v. McIntire*, 1 J. J. Marsh. 206-209; also *Green v. State*, 59 Md. 125, 43 Am. Rep. 542, in which the court of appeals of that state, per Irving, J., says: "The general method prescribed for drawing juries is mandatory, and substantial

compliance with the provisions thereof in respect to the selection and drawing of jurors is necessary to make the jury a legal one; and unless the selections are made by the judge in the manner pointed out by the statute, exception at the proper time and in the proper way may be successfully taken to a jury improperly chosen or drawn; otherwise the statutory provisions would be wholly nugatory;" also *Dutell v. State*, 4 G. Greene, 125, which was to review the denial of a motion "to quash the indictment on the ground that the grand jurors who found it were not selected according to law." The court says, per Greene, *J.*: "But it is urged by the attorney general, that the defendant cannot raise this objection after the indictment is found, but that he should have challenged the panel of the grand jury. This course may be adopted with propriety by a defendant held to answer for a public offense; but can it be expected that citizens at large, against whom there is no imputation of offense, are required to appear and challenge the panel of grand jurors, or be forever precluded from raising an objection to their selection or authority to act? It is true, as a general rule, that when the indictment is duly exhibited in open court, and indorsed 'a true bill,' it is evidence that it was duly found by a legal grand jury. But when the records of a county show that the grand jury were not legally selected, and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited and indorsed by legal authority." See also *Keitler v. State*, 4 G. Greene, 291; *State v. Symonds*, 36 Me. 128.

Evidence of irregularities in the selection or empanelling of the grand jury which do not affect the material rights of the suspect, are inadmissible, as in such case the irregularities if proven would afford no valid ground of objection to the indictment. *People v. Petrea*, 92 N. Y. 128.

Courts will not listen to an objection made to the constitutionality of an act by the party whose rights it does not affect, and who, therefore, has no interest in defeating it. *Cooley*, Const. Lim. 163, 164; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631. Nor will they look with indulgence upon objections to irregularities in the mode of selecting or drawing grand jurors committed without fraud or design, which have not resulted in placing upon any panel disqualified jurors.

"Mere irregularities in the drawing of a grand jury and petit

jurors do not furnish a ground for reversing a conviction unless it appears that they operated to the injury or prejudice of the prisoner." *Cox v. People*, 80 N. Y. 500.

§ 152. **Evidence in Support of Verdict.**—Affidavits of the jurors are always admissible to sustain their verdict as rendered, and while evidence is rarely heard to impeach a verdict, in all cases where it becomes necessary to sustain the conclusion reached, affidavits tending to that result may be read as evidence. *State v. Bailey*, 32 Can. 83; *Downer v. Baxter*, 30 Vt. 467; *Martin v. People*, 54 Ill. 225; *Thrall v. Lincoln*, 28 Vt. 356; *State v. Wart*, 51 Iowa, 587; *Clayton v. State*, 100 Ind. 204; *Taylor v. Everett*, 2 How. Pr. 23; *Long v. State*, 95 Ind. 486; *Kennedy v. Com.* 2 Va. Cas. 510; *De Hart v. Etnire*, 121 Ind. 244; *State v. Cucuel*, 31 N. J. L. 249; *Carter v. Ford Plate Glass Co.* 85 Ind. 189; *Coker v. State*, 20 Ark. 53; *Medler v. State*, 26 Ind. 171; *Jenkins v. State*, 41 Tex. 128; *Spencer v. Trafford*, 42 Md. 1; *Stanton v. State*, 13 Ark. 317; *Eastwood v. People*, 3 Park. Crim. Rep. 25; *People v. Kelly*, 46 Cal. 357; *Tenney v. Evans*, 13 N. H. 462; *People v. Murray*, 85 Cal. 361; *State v. Howard*, 17 N. H. 171; *People v. Dye*, 62 Cal. 523; *State v. Pike*, 20 N. H. 344; *People v. Goldenson*, 76 Cal. 352; *State v. Ayer*, 23 N. H. 301; *People v. Thornton*, 74 Cal. 488; *Boynton v. Trumbull*, 45 N. H. 408; *Grinnell v. Phillips*, 1 Mass. 530; *Dana v. Tucker*, 4 Johns. 487; *Ferrill v. Simpson*, 8 Pick. 359; *Crockett v. State*, 52 Wis. 214; *Grottkau v. State*, 70 Wis. 470; *Bradford v. State*, 15 Ind. 347.

Jurors cannot be called as witnesses to prove their own official misconduct or that of their fellows. Such a course is conspicuously illegal. The court cannot base its action on such testimony, for it has been the long established rule that jurors cannot be called to the stand for such a purpose. *Titus v. State*, 49 N. J. L. 36.

CHAPTER XXV.

EVIDENCE OF OTHER OFFENSES.

§ 153. *The General Rule Excludes.*

154. *An Exception Noted to the Above Rule.*

155. *Evidence of Another Crime if Pertinent to the Issue is Admissible.*

156. *Rule as to Misdemeanors.*

157. *Evidence of other Offenses Should be Cautiously Admitted.*

158. *Fabrication and Suppression of Evidence.*

§ 153. **The General Rule Excludes.**—It is indeed elementary law that no evidence can be admitted which does not tend to prove the issue joined, and the reason and necessity of the rule are much stronger in criminal than in civil cases for the observance of this rule and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character. *People v. Sharp*, 107 N. Y. 427.

The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one. *Coleman v. People*, 55 N. Y. 81; *State v. Lapage*, 57 N. H. 245; *People v. Gibbs*, 93 N. Y. 471; *Snyder v. Com.* 85 Pa. 519; *Com. v. Miller*, 3 Cush. 243; *State v. Turner*, 76 Mo. 350; *Brock v. State*, 26 Ala. 105; *State v. Shuford*, 69 N. C. 486; *Stone v. State*, 4 Humph. 27; *Rosenweig v. People*, 63 Barb. 634; *Barton v. State*,

18 Ohio, 221; *Coble v. State*, 31 Ohio St. 100; *Bonsall v. State*, 35 Ind. 460; *Sutton v. Johnson*, 62 Ill. 209; *Baker v. People*, 105 Ill. 452; *State v. Miller*, 47 Wis. 530; *People v. Barnes*, 48 Cal. 551; *Cesure v. State*, 1 Tex. App. 19; *State v. Boyland*, 24 Kan. 186; *Cole v. Com.* 5 Gratt. 696; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

The above authorities conclusively show that it is beyond the countenance of either precedent or statute to disturb this rule.

It is said by the court, in *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 651: "Logically the commission of an independent offense is not proof of itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for, certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged; it, therefore, predisposes the mind of the juror to believe the prisoner guilty." It tends to give undue prominence, force and weight to all the other evidence in the case for the prosecution. It detracts, in like manner, but in double portion, from all the evidence in his defense. It prejudices the jury against him, and inclines them to look with suspicion on all who come forward to testify in his favor. Hence, it is "not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues, that tend to confuse and mislead the jury." *State v. Lapage*, 57 N. H. 245.

§ 154. **An Exception Noted to the Above Rule.**—It is familiar knowledge that few postulates of law are without exception. And to the general rule, which excludes evidence of another felony than the one under review, we find an exception in cases where several felonies are connected together. This view is upheld in *Rex v. Ellis*, 6 Barn. & C. 145, where the court says: "Generally speaking, it is not competent for a prosecutor to prove a man guilty by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, the one is evidence to show the character of the other." Mr. Roscoe (*Roscoe, Crim. Ev.* 86) cites a case referred to by Lord Ellenborough in *Rex v. Whiley*, 2 Leach C. C. 985, where a man committed three burglaries in one night, and stole a shirt in one place and left it in another, and they were all so connected that the court heard the history of all

three burglaries, and Lord Ellenborough remarked that "if crimes do so intermix, the court must go through the detail." See also *Pierce v. Hoffman*, 24 Vt. 527; *Bottomley v. United States*, 1 Story, 142; *Baalam v. State*, 17 Ala. 433; *Dunn v. State*, 2 Ark. 243, 35 Am. Dec. 54; *Com. v. Call*, 21 Pick. 522, 32 Am. Dec. 284; *Rex v. Dunn*, 1 Moody, C. C. 150; *Rex v. Wylie*, 1 Bos. & P. N. R. 92; *Rex v. Long*, 6 Car. & P. 179; *Rex v. Mogg*, 4 Car. & P. 364; *Rex v. Egerton*, 1 Russ. & R. 375; *Tharp v. State*, 15 Ala. 757.

It is never competent upon a criminal trial to show that the defendant was guilty of an independent crime not connected with or leading up to the crime for which he is on trial, except for the purpose of showing motive, interest or guilty knowledge. Earle, J., in *People v. Greenwall*, 108 N. Y. 301.

It has been reasoned, but on grounds that will not be everywhere admitted, that, under certain indictments, evidence of previous crimes may be shown. Judge Rapallo says: "The cases in which offenses other than those charged in the indictment may be proven, for the purpose of showing guilty knowledge or intent, are very few." *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 429. The very language employed indicates that there are cases where such evidence is relevant.

"To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the

jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649 (Agnew, J.).

In the case of *Bottomley v. United States*, 1 Story, 135, that eminent jurist said: "In all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. . . . In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts [that is other acts and declarations of a similar character] tending to establish such intent or knowledge, are proper evidence."

It is certainly true that, in a criminal trial, evidence may be received of any one of a system of crimes, mutually dependent, but there must be a system established between the offense on trial, and that introduced, to connect it with the defendant. *Hester v. Com.* 85 Pa. 139. To make one criminal act evidence of another, some connection must exist between them; that the connection must be traced in the general design, purpose or plan of the defendant, or it may be shown by such circumstances of identification as necessarily tends to establish that the person who committed one must have been guilty of the other. The collateral or extraneous offense must form a link in the chain of circumstances or proofs relied upon for conviction; as an isolated or disconnected fact it is of no consequence; a defendant cannot be convicted of the offense charged simply because he is guilty of another offense.

In the case of *Goerson v. Com.* 99 Pa. 388, Mercur, J., giving the result of all the cases upon the admissibility of such testimony, says: "Yet, under some circumstances, evidence of another offense by the defendant may be given. Thus, it may be to establish identity; to show the act charged was intentional and willful, not accidental; to prove motive; to show guilty knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered to be poison; to show him to be one of an organization banded together to commit crimes of the kind charged, and to connect the other offense with the one charged as part of the same transaction." *Swan v. Com.* 104 Pa. 218.

Where it is necessary to prove a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent. In cases of uttering forged instruments; "receiving stolen property; passing worthless bank bills,—these, and many other cases might be referred to." See *People v. Schweitzer*, 23 Mich. 310, and *note*. See marginal note appended to the case of *People v. Wakely*, 62 Mich. 297.

If a prisoner upon trial for one offense does call out facts on cross-examination, without objection, tending to show that he is not guilty of another offense, this does not justify evidence on the part of the prosecution to prove that he is guilty of the other offense. The accused can only be tried for the crime charged; and this rule cannot be abrogated by evidence which may have been called out in relation to another crime. If a person on trial for stealing a horse gives evidence, without objection, that he did not on some other occasion steal other property, it would not be competent for the prosecution to introduce evidence that he was in fact guilty of the other crime; and especially not, if the evidence as to the other property came out incidentally upon cross-examination. A party does not acquire the right to give immaterial evidence because his adversary has done the same thing. The rule involved would apply when a party had given secondary evidence of a material fact, but does not unless the evidence itself is material. Otherwise, the parties could make every trial interminable, by litigating collateral questions. *Coleman v. People*, 55 N. Y. 81.

Another exception to the general rule that independent crimes cannot be proved, is found in that class of cases where acts are shown to have been done as part of the same plan or scheme of fraud. *Jordan v. Osgood*, 109 Mass. 457. Where an act is shown to have been done by a party entrusted with money, and the inquiry is whether it was an act of embezzlement, other acts in the conduct of the same business are admissible as showing his criminal intent. *Rex v. Ellis*, 6 Barn. & C. 145; *Com. v. Tuckerman*, 10 Gray, 173; *Com. v. Shepard*, 1 Allen, 575; *Reg. v. Richardson*, 2 Fost. & F. 343.

So where there is evidence of a conspiracy between the defendant and a deputy collector to defraud the revenue, by entering goods at an undervaluation, evidence of other transactions in the

conduct of the criminal enterprise is admissible. *Bottomley v. United States*, 1 Story, 135. Where a conspiracy to defraud is alleged, other fraudulent purchases than those set out in the indictment, made about the same time and in pursuance of the conspiracy, are admissible for the purpose of showing the intent with which the goods were purchased. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Rex v. Roberts*, 1 Campb. 399. In this class of cases the acts done are connected by unity of plan and motive, and therefore bear upon the purpose, the criminality of which is in question.

Judge Dixon in *State v. Raymond*, 53 N. J. L. 260, tabulates a series of exceptions to this general rule in the manner following: "One arises, where the circumstances of the crime indicate that they were both committed by the same person—as if two buildings should be fired by similar novel contrivances (*Com. v. Choate*, 105 Mass. 451) or, perhaps, the notorious Whitechapel murders. Another, when the defendant's perpetration of an extraneous crime shows that he had the opportunity of committing the crime in issue. *Reg. v. Cobden*, 3 Fost. & F. 833. Another, when the several crimes may have sprung from a single motive, aiming at the accomplishment of the same end. *People v. Wood*, 3 Park. Crim. Rep. 681. Another exception exists, when the commission of a different offense discloses a motive for the commission of the offense charged; *e. g.*, the defendant's adultery with a wife may be relevant on his trial for the murder of her husband. *Com. v. Ferrigan*, 44 Pa. 386. Another, when one crime may have been perpetrated for, or means of committing, concealing or escaping from another. *Rex v. Clewes*, 4 Car. & P. 221. Exception is made also, when the acts charged to be criminal may reasonably be innocent, and are criminal only when performed with a certain intent or with knowledge of a certain fact; in such case, other acts of the defendant, though criminal, may be adduced to prove that he had such specific intent or knowledge. In this category stand the decisions with regard to the utterance of counterfeits, the making of false pretenses, the reception of stolen goods, the publication of libels, and, probably, occurrences claimed by the defendant to be accidental." Whart. Crim. Ev. § 50 and notes; *Reg. v. Francis*, L. R. 2 C. C. 128.

His honor concludes in the following language:

"And in general it may be said that whenever the defendant's

guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown. But it must not be supposed that the defendant's propensity to commit crime, or even to commit crimes of the same sort as that charged, can be put in evidence to prove his guilt of the particular offense; for, however reasonable would be the deduction that, when a pocket is picked in a group of persons, of whom only one is addicted to picking pockets, he is the offender, his singularity in this respect could not, under our legal theory, figure as proof of his guilt. There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition."

In *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, the prisoner was charged with murdering one Withey who was a married man. The prisoner was also a married man. Evidence had been given of intimate relations, though not necessarily criminal, between the prisoner and Withey's wife, before the death of the deceased. After the murder the prisoner took the widow and her sister to the house of a friend in the evening and came away with the widow late that night alone. A few days after the murder the prisoner disappeared from the neighborhood. It was then proved by a witness from Michigan, who was a clergyman, that the prisoner and the widow of Withey appeared before him and were married, and the prisoner declared on oath before him that he knew of no legal obstacle to his marriage with the woman and thereupon he married them. This evidence was objected to on the ground that it had no direct or material bearing upon the main question in the case, and that it simply tended to prejudice the prisoner by proving him guilty of another and separate felony. The evidence as to the murder was circumstantial, and this court held that the evidence in controversy was proper for the purpose of proving a motive for the murder. In that case the evidence showed a direct and logical connection between the murder of the deceased and its perpetration by the prisoner. It showed that the prisoner had a passion for the possession of the wife of the deceased, and that for the purpose of obtaining possession of her person he did commit the crimes of perjury and bigamy, and to accomplish this possession of the woman, the tak-

ing off of the woman's husband was an obvious necessity. The motive of the prisoner was the desire for the woman, and the strength of that desire, in other words the strength of the motive which impelled the murder was shown in this way.

In the case of *People v. Wood*, 3 Park. Crim. Rep. 681, evidence had been given of separate and distinct felonies committed by the prisoner for the purpose of showing motive on his part in the killing of the deceased. The learned court held that the evidence was admissible because it tended to show with other evidence that the felonies were parts of a single transaction, influenced by a single motive and designed to accomplish a single object; that they were all connected by unity of plot and design, and, if proved, would tend to show the motive which actuated the prisoner in taking the life of the person stated in the indictment. In that case the evidence tended to show that each felonious act was a necessary one for the purpose of carrying out the main object which then existed in the mind of the prisoner, and that all of them formed but one transaction and were connected together as parts of one whole.

The case of *Stout v. People*, 4 Park. Crim. Rep. 132, contains the same general principles. There, evidence was admitted to the effect that the prisoner was seen in bed with the wife of the man he was charged with murdering, although such wife was also the prisoner's sister, and it was admitted as furnishing a motive for the prisoner to get the husband out of the way. *Com. v. Tuckerman*, 10 Gray, 173, was a case of embezzlement and evidence of other embezzlements from the same party during a series of years and contained in a statement made by the prisoner, was admitted.

Com. v. McCarthy, 119 Mass. 354, was an indictment for arson. To prove the intent of the prisoner evidence was received that on two prior occasions the prisoner had set fire to a shed ten feet distant from the building destroyed and connected therewith by a flight of stairs. This had a direct tendency to prove that the firing was not accidental but intentional and felonious.

Com. v. Bradford, 126 Mass. 42, was an indictment for arson, and the same class of evidence was received and for the same purpose.

Com. v. Merriam, 14 Pick. 518, 25 Am. Dec. 420, was an indictment for adultery. Evidence of improper familiarity between

the defendant and the same woman, shortly before the act in question was admitted. The evidence was admitted on the ground that intimacy and these acts of familiarity with the same woman had a tendency to establish the fact of the adultery charged in the indictment. Evidence tending to show previous acts of indecent familiarity would have a tendency to prove, in the case of the same woman, of course, a breaking down of all the safeguards of self respect and modesty and hence a gradual separation of the woman to lend herself to the commission of the crime.

The case of *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, the court simply held that upon the trial of the defendant for the crime of rape, it was competent to prove that he had attempted to commit the same crime upon the same woman a short time prior thereto. It was put upon the ground that upon the trial of a person for a particular crime it is always competent to show upon the question of his guilt that he had made an attempt at some prior time, not too remote, to commit the same offense. It was said further that it would be incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. And it was stated that upon the trial of a prisoner for murder, it is competent to show that he had made previous attempts or threats to kill his victim, and hence, upon the same principle, it was held that when charged with rape it was competent to show that the defendant had previously declared his intention to commit the offense or made an unsuccessful attempt to do so.

In the case of *Com. v. Abbott*, 130 Mass. 472, upon an indictment for murder, proof was offered on the part of the prisoner of former ill feeling of the husband of the deceased toward the deceased. It was rejected as too remote and disconnected with the crime charged. Particularly as there was evidence of the parties living together on good terms, long subsequent to the time of this alleged ill feeling.

In *Com. v. Jackson*, 132 Mass. 16, the prisoner was indicted for selling property by false representations under the Massachusetts statute. Evidence of sales of other property of a like nature to other persons under representations proved false was admitted for the purpose of showing the intent with which the representations in question were made. The supreme court of Massachusetts held that the evidence was inadmissible, and that

for the error of its admission a new trial should be granted. The case is cited only for the purpose of quoting the opinion of the court upon the danger of this kind of evidence.

Devens, *J.*, writing the opinion, said that, "the other statements made by the defendant at other times as to the other animals which he sold, might have been false, while those made in the case for which he was tried were not. The transactions formed no part of a single scheme or plan any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. Even if they were transactions of the same general character, they differed in all their details, and the defendant was compelled to defend himself against three distinct charges in addition to the one for which alone he was indicted. Evidence of the commission of other crimes by a defendant may deeply prejudice him from the jury, while it does not legally bear upon his case. It certainly would not be competent in order to show the intent with which one entered a house or took an article of personal property to prove that he had committed a burglary or larceny at another time."

§ 155. **Evidence of Another Crime if Pertinent to the Issue is Admissible.**—Although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible. If the evidence offered tends to prove material fact, it is admissible, although it may also tend to prove the commission of another distinct and separate offense. *Mason v. State*, 42 Ala. 532; *Rex v. Kirkwood*, 1 Lewin, C. C. 103; *Com. v. Stearns*, 10 Met. 256; *Reg. v. Aston*, 2 Russell, Crimes (4th ed.) 841; 3 Russell, Crimes, 286; *Reg. v. Weeks*, Leigh & C. 18, 21.

"The principle is, that all the evidence admitted must be pertinent to the point in issue; but if it be pertinent to this point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts." *Com. v. Choate*, 105 Mass. 451, 458. In *Reg. v. Lewis*, 6 Car. & P. 161, Lord Denman "could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge." Evidence of other crimes than the one charged is so frequently received on indictments for forgery and counterfeiting,

and uttering forged or counterfeit papers or coins, that those classes of cases are sometimes erroneously spoken of as exceptions to the general rule of evidence. They are not exceptions. Evidence is received in all cases when it is relevant (unless it is rejected, on some ground of fact, by an exercise of judicial discretion) without reference to the question whether the facts proved are criminal or not. Its competency consists, not in the innocent character of the act which it tends to prove, but in the relevancy of that act to the issue. Evidence of other crimes is more frequently received in cases of forgery and counterfeiting than in other cases, not because those cases are exceptional in law, but because, in fact, such evidence is more frequently available in those than in other cases to prove a material fact. It is admitted to prove the guilty knowledge, the motive, or the intent, not because there is any exception or special rule of law applicable to proof of the defendant's knowledge, motive, or intent, but because his knowledge, motive, or intent is a material fact to be proved, like any other material fact, by relevant evidence. Archb. Crim. Pl. (4th ed.) 486. See *State v. Lapage*, 57 N. H. 245.

Competent evidence for the purpose of showing the existence of a motive for the commission of the offense charged, is none the less so because it is also proved the commission of another crime. *Pierson v. People*, 79 N. Y. 424; *Pontius v. People*, 82 N. Y. 339.

§ 156. **Rule as to Misdemeanors.**—In Michigan, Indiana, Wyoming, and perhaps in other jurisdictions, it has been, in effect, held that in misdemeanors the prosecution on a trial under an indictment so drawn that it might cover a number of different offenses of the same nature, after examining the first witness as to one offense on a day certain, must confine its proof to that particular offense, and that the admission of evidence tending to prove other offenses is improper. *Fields v. Wyoming*, 1 Wyo. 78; *People v. Clark*, 33 Mich. 112; *Richardson v. State*, 63 Ind. 192. In Missouri, however, a different rule has prevailed for half a century. In *Storrs v. State*, 3 Mo. 10, where several distinct violations of the "act to license retailers of vinous and spirituous liquors," approved February 4, 1825, were charged in a single count of the indictment, it was decided that distinct felonies of the same character and degree, though committed at different times, may be charged in the same count in

the indictment, and it will be no ground either of demurrer, or arrest of judgment. In such cases, however, the prosecution may be compelled to elect on which charge he will proceed. But in the case of offenses, inferior to felony, the practice of calling on the prosecutor to elect on which charge he will proceed does not exist, and the prosecutor may give evidence of several libels, assaults, etc., upon the same indictment whether they be on the same or different persons. In *State v. Kibby*, 7 Mo. 317, it was held that the joinder of several offenses in the same indictment in different counts is no cause of demurrer or arrest of judgment. When the crimes alleged are misdemeanors the court will not compel the prosecutor to elect on which one he will proceed. To the same effect are *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281; *State v. Nelson*, 19 Mo. 393. In *State v. Fletcher*, 18 Mo. 426, it was declared that, "in cases of misdemeanors the joinder of several offenses will not in general vitiate in any stage of the prosecution. For, in offenses inferior to felony, the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, does not exist. But on the contrary it is the constant practice to receive evidence of several libels and assaults upon the same indictment. It was formerly held that assaults upon more than one individual could not be joined in the same proceeding, but this is now exploded. And this practice is approved in *State v. Myers*, 20 Mo. 410.

§ 157. **Evidence of Other Offenses Should be Cautiously Admitted.**—It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. Roscoe, Crim. Ev. 90, 94; *Rex v. Ball*, Russ. & R. 132; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596.

"Proof that a man has violated the law in particular instances, cannot be rebutted by proof that he did not violate it in other instances when he had the opportunity, and was tempted to do

so." *Com. v. Barlow*, 97 Mass. 597; *Albrecht v. People*, 78 Ill. 510.

§ 158. **Fabrication and Suppression of Evidence.**—"The suppression or destruction of pertinent evidence, is always a prejudicial circumstance of great weight; for, as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is." 1 Starkie, Ev. p. 437.

By a parity of reasoning any attempt to prevent the attendance of a witness who is morally certain to give important testimony in the case is a fact that may be proved at the trial as warranting a legitimate inference of guilt. *People v. Pitcher*, 15 Mich. 397; *State v. Staples*, 47 N. H. 113; *People v. Hovey*, 29 Hun, 382.

It is error however, to indulge this inference merely from the fact that a party fails to call a certain witness. No prejudice should arise from such failure unless the witness be a material one and presumptively under the special control of the party. *Scovill v. Baldwin*, 27 Conn. 316; *Williams v. Com.* 91 Pa. 493.

In this connection it is well to recall the statements of a previous paragraph in the text that no adverse presumption arises from the fact that the defendant fails to take the stand in his own behalf. By statutory enactment in many states, such failure is not even the subject of comment from the presiding judge or public prosecutor; although it would seem that where such comment is made, it is no ground for a new trial. *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121.

The language of the opinion in the celebrated *Ruloff* case, will sustain this averment of the text. "Upon a criminal trial, the presiding judge has no right, in charging the jury, to allude to the fact that the prisoner has not availed himself of the statutory privilege of being a witness in his own behalf, but where such allusion is made and subsequently, upon his attention being called to it, he states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not being sworn. Held, that this cured the error." *Ruloff v. People*, 45 N. Y. 213.

The resort to falsehood and evasion by one accused of a crime affords of itself a presumption of evil intentions, and has always been considered proper evidence to present to a jury upon the

question of the guilt or innocence of the party accused. *United States v. Randall*, Deady, 524; *State v. Reed*, 62 Me. 129; *Com. v. Goodwin*, 14 Gray, 55.

"The falsity of the various accounts given by the defendant of the circumstances attending the commission of the crime, so far from modifying the force of the express admission of Conroy that he intended to shoot Keenan, gives it additional weight, and would of itself afford sufficient ground to authorize an inference of guilt, by the jury. Although the evidence shows that the defendant had been drinking during the evening, it does not show that he had become intoxicated, or that the liquor taken by him had obscured his reason or weakened his intellect. The readiness with which he saw the danger his conduct had brought upon him, and the promptitude with which he adopted precautions to obviate it, were circumstances from which a jury might well conclude that he perpetrated the act with an understanding of its consequences and a reckless disposition to brave them." *People v. Conroy*, 97 N. Y. 62.

The mere fabrication of evidence does not furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts, of which several instances are stated in the books. Again, the exercise by a client of his undoubted right to prevent his solicitor from disclosing confidential communications, can form no just ground for adverse presumption against him. Neither has the mere non-production of deeds or papers, upon notice, any other legal effect in general than to admit the other party to prove their contents by parol, and, as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped. It cannot, however, be denied, but that such conduct, in the absence of all excuse, is calculated to produce in the minds of the jury a very prejudicial effect against any person having recourse to it; and if such person be charged with fraud or other misconduct, and the production of his papers would establish his guilt or innocence, the jury will be amply justified in presuming him guilty from the unexplained fact of their non-production. On the same principle, jurors will do well to regard with suspicion the conduct of any party, who, having it in his power to pro-

duce cogent evidence in support of his case, is content to offer testimony of a weaker and less satisfactory character. 1 Taylor, Ev. § 117, citing 3 Coke, Inst. 232; Wills, Circ. Ev. 154; *Wentworth v. Lloyd*, 33 L. J. Ch. 688, per Lord Chelmsford, Dom. Proc. 10 H. L. Cas. 589; *Cooper v. Gibbons*, 3 Campb. 363; *Crisp v. Anderson*, 1 Stark. 35; *Roe v. Harvey*, 4 Burr. 2484, per Lord Mansfield; *Bate v. Kinsey*, 1 Crompt. M. & R. 41, per Lord Lyndhurst; *Sutton v. Devonport*, 27 L. J. C. P. 54; *Edmonds v. Foster*, 45 L. J. M. C. 41; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; New York Civ. Code, § 1852, art. 6, 7.

Mr. Colby, in his well known treatise on Criminal Law, under the caption above indicated, employs the following pertinent language:

“Among examples of this nature may be mentioned the common case of obliteration of marks of identity, as by filing away the engraving from articles of plate, or the removal or endeavor to remove from the person or clothes stains of blood or other marks. The shoeing of a horse backwards, so as to reverse the tracks, and many other instances of the obliteration or distortion of marks of identity. Wills, Circ. Ev. 75; 1 Whart. Am. Crim. Law, 723.”

In the case of an indictment for murder by poisoning, the contents of the stomach, which had been placed in a jug for examination, were clandestinely thrown by the prisoner into a vessel containing a large quantity of water. Upon this circumstance, the learned judge commented very forcibly in his charge to the jury. “What pretense,” said he, “was there for this? And if the prisoner did it, why do it in secrecy? Why place the jug in the precise condition in which it was left by the medical man? Why not allow it to remain in the situation in which a vessel may be placed in the progress of such an examination.” *Donnall's Case*, Frazier, 171.

The concealment of death by the destruction or attempted destruction of human remains falls within the same classification. Bemis' Webster case, 471; *Rex v. Gardelle*, 4 Celebrated Trials, 400.

Prominence among the cases of suppression of evidence is the attempt to prevent post mortem examinations by the premature interment of human remains, under the pretext that it is necessary by the state of the body. In the case of violent or sudden death, and especially when caused by poison, it cannot but be

known that the post mortem examination will always furnish important and generally conclusive evidentiary matter as to the cause of death. Besides the suppression, destruction and fabrication of evidence by criminals, which, when detected, raises a strong presumption against them, facts are often simulated for the purpose of attracting suspicion in a direction different from the true one. Sometimes the object of simulated facts is not merely to divert suspicion from the real culprit, but also to attract it toward a particular individual; and such is the weakness of human nature that there are even instances where innocence has degraded and betrayed itself by the simulation of facts, for the purpose of evading the force of circumstances of apparent suspicion. Wills, Circ. Ev. 79-82; *Rex v. Coleman*, 1 Remarkable Trials, 162, 4 Remarkable Trials, 344.

CHAPTER XXVI.

DUTY OF JURY IN WEIGHING EVIDENCE.

- § 159. *What Rules Should Govern.*
- 160. *A Distinction Noted.*
- 161. *Reconciling Variances.*
- 162. *Review of an Apt Decision in the United States Circuit Court.*
- 163. *Notes and Memoranda in the Jury Room.*
- 164. *May Return into Court for Information.*
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- 166. *Relative Weight of Positive and Negative Testimony.*
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- 168. *Statement of the Pennsylvania Rule.*
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§ 159. **What Rules Should Govern.**—In deliberating upon the evidence adduced in the trial of a criminal case, the jury should keep in mind one cardinal principle that is occasionally overlooked. It is the wide distinction between evidence which tends to satisfy an intelligent jury, that the accused has perpetrated a crime, and such evidence as merely tends to raise in the mind of the jury a suspicion of guilt. *People v. Williams*, 29 Hun, 520.

The question as to the weight of testimony is for the jury exclusively, and it would have been an invasion of their province for the judge to say to them that the character which the prisoner may have established should have great weight with them. The utmost that could be asked of him would be to say to the jury that if they believed that the prisoner had established a good character, that would be a circumstance to be taken into consideration by them in forming their conclusion. *State v. Tarrant*, 24 S. C. 593.

Within certain limits, the judge may propose to the jury certain rules to aid them in weighing the evidence, and even in determining the credibility of witnesses. *Thomp. Trials*, § 2414, citing *O'Neil v. State*, 48 Ga. 66; *McLean v. Clark*, 47 Ga. 24; *Poertner v. Poertner*, 66 Wis. 644.

Some embarrassment arises when a defendant in a criminal

case offers himself as a witness in his own behalf. In such a case it is the duty of the jury to give his evidence all the credit to which it is entitled; but, in ascertaining the extent of its credibility it is proper and necessary to consider the situation in which he is placed. A person accused of a crime may speak the truth, and it is for the jury to say, in view of all the facts whether or not he has done so in whole or in part. They should give proper weight and effect to all his evidence, if they are convinced of its truth, or so much thereof as in their best judgment is entitled to credit. *State v. Slingerland*, 19 Nev. 135.

If he makes conflicting statements as to material facts, a charge by the court that if the jury believe that such witness has willfully testified falsely, he is not entitled to credit, and they are authorized to disbelieve his entire testimony, is proper.

As to whether it would be proper for the court to direct the jury to wholly disregard the testimony of a witness who had testified to a willful falsehood, *quære*. *Dunlop v. Patterson*, 5 Cow. 243, 247; *People v. Evans*, 40 N. Y. 1; *Pease v. Smith*, 61 N. Y. 477, 489; *Deering v. Metcalf*, 74 N. Y. 503-505; *Dunn v. People*, 29 N. Y. 523; *People v. Petmecky*, 99 N. Y. 421; *Moett v. People*, 85 N. Y. 373; *The Santissima Trinidad & The St. Ander*, 20 U. S. 7 Wheat. 338, 339, 5 L. ed. 468; *Huber v. Teuber*, 3 McArth. 485; 2 Starkie, Ev. 873; *Sanders v. Leigh*, 2 Harr. & McH. 380; Best, Presumptions, 206.

It is unquestionably the duty of the jury to give careful and respectful consideration to the instructions of the court, in every criminal cause, and not to disregard such instructions, except for some sufficient reason addressing itself to their judgment; yet, when the time for their ultimate decision upon the merits of the cause is reached, they have the right to determine for themselves the law as well as the facts by which their verdict shall be governed. *McDonald v. State*, 63 Ind. 544.

We have considered what evidence is necessary; we have now to consider what evidence is admissible as relevant to the issue. Bearing in mind all that has been said as to the nature of the issue or issues raised by an ordinary criminal pleading, it may be laid down as a general rule, that in criminal, as in civil cases, the evidence shall be confined to the point in issue. In criminal proceedings it has been observed (3 Russell, Crimes (5th ed.) 368), that the necessity is stronger, if possible, than in civil cases, of

strictly enforcing this rule; for where a prisoner is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and matters relating thereto, which alone he can be expected to come prepared to answer. The importance of keeping evidence within certain prescribed grounds is greater now than before the alterations in criminal pleadings. *Roscoe*, *Crim. Ev.* 92.

We have elsewhere adverted to the duty of the court to strike out improper evidence that has been inadvertently or unadvisably received, but we cannot be too emphatic in reminding the practitioner that evidence of this character when accompanied by circumstances likely to influence a jury to the prejudice of the accused is not deprived of its obnoxious qualities by being merely stricken from the record. If its effect is evidently pernicious its reception must work a reversal. There is a conflict upon this point and great caution should be exercised in instances of this nature. *People v. Zimmerman*, 4 N. Y. *Crim. Rep.* 272.

The jury are not justified in disregarding evidence in the case, unless there is some reason to believe there is some unworthiness or turpitude on the part of the witness offering it.

It is a familiar rule, that no discredit can attach to a testifying witness in the absence of something discrediting to his character. *Meixsell v. Williamson*, 35 Ill. 533; *Hartford Life & A. Ins. Co. v. Gray*, 80 Ill. 28; *Chittenden v. Evans*, 41 Ill. 253. The same distinguished court is also authority for the proposition that the weight and credibility of defendant's testimony in a criminal case, must depend upon the testimony of the witnesses taken in its entirety; and as to the duties of the court in giving proper instructions as to the weight and credibility of this testimony, see *Chambers v. People*, 105 Ill. 414; *Bulliner v. People*, 95 Ill. 407; *Bartholomew v. People*, 104 Ill. 601, 44 Am. *Rep.* 97.

§ 160. **A Distinction Noted.**—The first point in weighing evidence is to ascertain whether the statements to which the witness has testified are facts within his own knowledge, that is, information which he has derived through the medium of his own senses, or whether they are mere beliefs which he entertains, founded upon the exercise of his reasoning powers, and based upon the occurrence of other facts and circumstances. *Colby*, *Crim. Law*, chap. 4, p. 160.

§ 161. **Reconciling Variances.**—Where the testimony of direct witnesses is apparently at variance, it is to be considered, in the first place, whether they be not in reality reconcilable, especially where there is no extrinsic reason for suspecting error or fraud. But, if their statements, upon examination, be found irreconcilable, it becomes an important duty to distinguish between the misconception of an innocent witness, which may not affect his general testimony, and willful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as of law in favor of innocence will attribute a variance in testimony to the former rather than to the latter origin. Partial incongruities, discrepancies in testimony, as to collateral points, are, as has been already observed, to be expected; and it is for a jury to determine whether in the particular instance they are of such a nature and character, under all the circumstances, that they may be or cannot be attributed to mistake. In estimating the probability of mistake and error, and also in deciding on which side the mistake lies, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject matters. *Starkie, Ev.* (10th Am. ed.) 866.

It is particularly the province of the jury to determine all conflicts in the evidence of a criminal trial, and this rule extends to cases where a witness is in conflict with himself. *State v. Adams*, 78 Iowa, 292.

§ 162. **Review of an Apt Decision in the United States Circuit Court.**—The entire range of legal literature fails to disclose a more felicitous exposition of this subject than that contained in the opinion of *Judge McCormick*, in the case of *United States v. Hughes*. The case is reported from the fifth circuit. The decision was handed down in 1888, and a very brief review of the well considered paragraphs will disclose its rare pertinency to the present discussion. His honor says:

“Each juror is entitled to have, and, in my judgment, is bound to thoughtfully and impartially consider the argument of counsel, the comments of the judge, and the views of his fellow jurors and allow all these such influence in helping him to a satisfactory conclusion as in his judgment their various suggestions deserve, and honestly to strive to bring his own mind and the minds of his fellows into harmony, so that the jury may agree upon a verdict.

It is true that if, in any given case, any one or more of the jury, after an earnest and impartial consideration of all these matters proper to be considered in weighing the evidence, under the law applicable thereto, as given in the charge of the court, cannot bring his mind or their minds to concur in the conclusion of his or their fellows as to the guilt or innocence of the accused, each such juror not only may, but must, adhere to the final and fixed conclusion of his own mind, for it is the logic and the law of jury trials that the twelve minds of the jury must actually and honestly concur in a verdict, before a verdict can rightly be rendered." *United States v. Hughes*, 34 Fed. Rep. 732.

§ 163. **Notes and Memoranda in the Jury Room.**—The court may permit the jury, upon retiring for deliberation, to take with them any paper or article which has been received as evidence in the cause, but only upon the consent of the defendant and the counsel for the people. The jury may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them.

But it is at all times the undoubted policy of the law to watch over the deliberations of the jury, and to guard them from all impressions and influences in respect to the issues involved not derived from a trial in open court, in the presence of the parties and their counsel, where ample opportunity is given to object to the admission of any evidence or comments not sanctioned by the law.

Slight circumstances and inconsiderable observations may sometimes influence a juror's mind. *Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 561; *Schappner v. Second Ave. R. Co.* 55 Barb. 497.

Private communication to a jury is very properly and strongly condemned by Johnson, J., in *Watertown Bank & Loan Co. v. Mix*, *supra*. The burden of showing improper communications or observations in writing or otherwise, should not be thrown upon a defeated party, who challenges any irregularity occurring in the deliberation hours of a retired jury. *Mitchell v. Carter*, 14 Hun, 448.

§ 164. **May Return into Court for Information.**—It is an elementary principle of criminal practice that the jury may, after their retirement, return into court to receive some further instructions either upon the evidence or as to some point of law. No

exception can be based upon such action in the absence of any prejudice shown and within proper limitation such action should be encouraged as leading to more accurate results in jury trials. *Drew v. Andrews*, 8 Hun, 23; *State v. Pitts*, 11 Iowa, 343; *Nelson v. Dodge*, 116 Mass. 367.

§ 165. **Instructions as to Duty in Weighing Evidence.**—It is competent for the court to instruct the jury, that in weighing the evidence of the accused, they could consider his interest in the case. In *Allen v. State*, 87 Ala. 107, in reference to a charge on this subject, it is said: "The court should not have gone further in this connection, than to instruct the jury that, in determining the weight they would give to the defendant's testimony, they should consider, along with other circumstances having any bearing on the matter, the fact that he was the defendant." *Norris v. State*, 87 Ala. 85.

In weighing the testimony of a party, and passing upon its credibility, the jury have an undoubted right to consider all the circumstance under which it is given, including his particular personal interest in the result of the trial; and it is not error for the court to remind them of the latter circumstance, provided he refrains from intimating or suggesting the degree of weight to be given it. See *Bulliner v. People*, 95 Ill. 394; *People v. Morrow*, 60 Cal. 142; *Minich v. People*, 8 Colo. 440.

§ 166. **Relative Weight of Positive and Negative Testimony.**—It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed. *Stitt v. Hvidekoper*, 84 U. S. 17 Wall. 385, 21 L. ed. 644.

The distinction between positive and negative testimony may be illustrated thus: it is positive to say a thing did or did not happen; it is negative to say that a witness did not see or know of its having happened. Where the witnesses are equally credible, positive testimony will outweigh negative testimony. But testimony stated in a negative form is not always negative testimony; thus, where a witness swears positively that the defendant did not strike the blow, this is not negative testimony, but is entitled to equal weight with the testimony of another witness, who swears that he did strike. Negative testimony

may sometimes, however, equal positive in weight, and even exceed it; as for instance, where there is an inherent improbability in the positive testimony. *Rapalje*, *Crim. Proc.* § 231, citing *McConnell v. State*, 67 Ga. 633; *Moon v. State*, 68 Ga. 687; *Johnson v. State*, 14 Ga. 55; *Delk v. State*, 3 Head, 79; *Coughlin v. People*, 18 Ill. 266, 68 Am. Dec. 541. See *Rapalje*, *Witnesses*, § 193.

The weight of the negative testimony depends upon the observation, whether exhaustive or slight. *Murphy v. People*, 90 Ill. 59. If the attention of the negative witness is concentrated on a particular point, his testimony may outweigh a witness who swears affirmatively, but whose attention has not been so concentrated. *Reeves v. Poindexter*, 53 N. C. 308; *Malone*, *Crim. Briefs*, p. 103.

Full and conclusive proof, where a party has the burden of proving a negative, is not required, but even vague proof, or such as renders the existence of the negative probable, is, in some cases, sufficient to change the burden to the other party. *People v. Pease*, 27 N. Y. 45.

§ 167. **Nature and Scope of the Scintilla Doctrine.**—Decided cases may be found, where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Schuylkill & D. Imp. & R. Co. v. Munson*, 81 U. S. 14 Wall. 448, 20 L. ed. 872; *Pleasants v. Fant*, 89 U. S. 22 Wall. 120, 22 L. ed. 782; *Parks v. Ross*, 52 U. S. 11 How. 373, 13 L. ed. 735; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 637, 19 L. ed. 1015; *Hickman v. Jones*, 76 U. S. 9 Wall. 201, 19 L. ed. 553.

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder v. Wombwell*, L. R. 4 Exch. 39.

“A jury cannot be permitted to find there is evidence of a fact

where there is not any. A plaintiff cannot read his writ to the jury and claim a verdict without submitting any evidence. Nor can he do so where the evidence is too slight or trifling to be considered or acted upon by a jury. The evidence must have some legal weight. There is no practical or logical difference between no evidence and evidence without legal weight." "The old rule that a case must go to the jury if there is a scintilla of evidence has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a court would set aside as often as found. The better and improved rule is, not to see whether there is any evidence, a scintilla, crumb, or dust of the scales, but whether there is any upon which a jury can, in any justifiable view, find for the jury producing it, upon whom the burden of proof is imposed." Accordingly, the presiding judge directs a non-suit where the jury would not be authorized for the plaintiff under the evidence adduced. *Thomp. Trials*, § 2449, citing *Connor v. Giles*, 76 Me. 132; *Beaulieu v. Portland Company*, 48 Me. 294; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Rourke v. Bullens*, 8 Gray, 549; *Pray v. Garcelon*, 17 Me. 145; *Head v. Sleeper*, 20 Me. 314.

As late as 1885 the Missouri supreme court held that "whether there is any evidence, or what its legal effect may be, is to be declared by the court. And if there is no evidence to support an issue, it is the duty of the court so to instruct the jury," but "if there is any evidence it must go to the jury, who are exclusive judges of its weight and sufficiency," "however slight it may be, and whether direct or inferential." Tested by this rule, let us advert briefly to the character and nature, force and effect of the plaintiff's evidence, and also to the position and relation of the parties plaintiff and defendant, to each other and to the title and possession of the premises in controversy. *Charles v. Patch*, 87 Mo. 450. It should be added that the courts of this state manifest a very strong attachment for a rule that is abrogated entirely in many jurisdictions. This attachment is evidenced by the following authorities. *Hays v. Bell*, 16 Mo. 496; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Chambers v. McGiveron*, 33 Mo. 202; *Deere v. Plant*, 42 Mo. 60; *McKown v. Craig*, 39 Mo. 156; *Matthews v. St. Louis Grain Elevator Co.* 50 Mo. 149; *Chamberlain v. Smith*, 1 Mo. 482; *Speed v. Herrin*, 4 Mo. 356; *Obouchon v. Boon*, 10 Mo. 442; *Robbins v. Alton Marine F. Ins. Co.* 12 Mo.

380; *Dooly v. Jinnings*, 6 Mo. 61; *Todd v. Boone County*, 8 Mo. 432; *Winston v. Wales*, 13 Mo. 569; *Clark v. Hannibal & St. J. R. Co.* 36 Mo. 202; *Lee v. David*, 11 Mo. 114; *Meyer v. Pacific R. Co.* 40 Mo. 151; *Glasgow v. Copeland*, 8 Mo. 268; *Hughes v. Ellison*, 5 Mo. 110; *Morton v. Reeds*, 6 Mo. 64; *Emerson v. Sturgeon*, 18 Mo. 170; *Rippey v. Friede*, 26 Mo. 523; *Charles v. Patch*, 87 Mo. 450; *Flori v. St. Louis*, 3 Mo. App. 231.

A note by the Hon. Robert Desty appended to the case of *People v. People's Ins. Exch.* 2 L. R. A. 340, collates the recent authorities bearing upon this subject and correctly expresses the principles of law obtaining with reference to this doctrine. I append a paragraph of the note referred to:

"Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that, in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof rests. *Schuykill & D. Imp. & R. Co. v. Munson*, 81 U. S. 14 Wall. 442, 20 L. ed. 867; *Pleasants v. Fant*, 89 U. S. 22 Wall. 120, 22 L. ed. 782; *Marion County v. Clark*, 94 U. S. 284, 24 L. ed. 61; *Grigys v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; *Wittkowsky v. Wasson*, 71 N. C. 451; *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729; *Burke v. Witherbee*, 98 N. Y. 562; *Culhane v. New York Cent. & H. R. R. Co.* 60 N. Y. 136; *McKeever v. New York Cent. & H. R. R. Co.* 88 N. Y. 667. Since the scintilla doctrine is exploded both in England and this country, the preliminary question for the court is not, whether there is no evidence or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Hyatt v. Johnston*, 91 Pa. 200; *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Codding v. Wood*, 112 Pa. 371. See note to *Charon v. Geo. W. Roby Lumber Co.* 66 Mich. 68. Where there is anything to go to the jury the case should be submitted (*Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 1); so if different minds could draw from the evidence different conclusions. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99;

Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745." See Abbott, Trial Brief (1885), 124.

It is clearly impossible to co-ordinate into any mutual relation of unity the discordant decisions upon this subject of scintilla evidence. The rules enforcing the observance of this theory have proven both untenable in doctrine and vicious in practice and should be ignored.

a. Statement of the Pennsylvania Rule.—Even in Pennsylvania where the principle received its utmost expansion, the more reasonable rule is now, as stated by *Mr. Justice Sharswood* in *Howard Exp. Co. v. Wile*, 64 Pa. 201, that "where there is any evidence, which alone would justify an inference of a disputed fact, it *must* go to the jury. There is in every case triable by jury a preliminary question of law for the court, whether or not there is any evidence from which the fact sought to be proved may be fairly inferred, if there is, that is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary. It is unnecessary to cite authorities in support of a principle so plain; this is the doctrine now generally recognized, not only in the courts of this and the sister states, but also in the Federal and English courts. In determining the sufficiency of the evidence, the court must of course take it as true, with every reasonable inference favorable to him who has the burden of proof. *Blakeslee v. Scott*, 37 Phila. Legal Int. 474; *Sidney School Furniture Co. v. Warsaw Twp. School Dist.* 122 Pa. 494."

b. Views of Judge Foster.—The following paragraph from the opinion of *Mr. Justice Foster* of the Maine supreme judicial court will outline the juridical view now in the ascendancy in that jurisdiction. The reaction from the Pennsylvania view is very pronounced :

"Upon a careful examination of the evidence in the case under consideration, we are satisfied that the verdict cannot stand. There is not sufficient evidence upon which a jury could properly found a verdict that the plaintiff himself was in the exercise of due care at the time he received his injury. This is an affirmative proposition which, in this state and many of the others it is incumbent on the plaintiff to make out by proof before he could be entitled to recover. *Dickey v. Maine Teleg. Co.* 43 Me. 492; *Lesan v. Maine Cent. R. Co.* 77 Me. 87; *State v. Maine Cent. R. Co.* 77 Me. 541; *Crafts v. Boston*, 109 Mass. 521; *Taylor v. Carew*

Mfg. Co. 140 Mass. 151. Nor will this proposition be sustained where the evidence in reference to it is too slight to be considered and acted on by a jury. It must be evidence having some legal weight. Such are the general doctrines of the decisions. A mere scintilla of evidence is not sufficient. *Connor v. Giles*, 76 Me. 134; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Corcoran v. Boston & A. R. Co.* 133 Mass. 509; *Nason v. West*, 78 Me. 256, and cases there cited; *Cornman v. Eastern Counties R. Co.* 4 Hurlst. & N. 784."

The old rule as stated by *Mr. Justice Sharswood* is likewise exploded in several of the states, whose courts are now in the constant habit of ordering nonsuits against the complaint of the plaintiff (*Colt v. Sixth Ave. R. Co.* 49 N. Y. 671; *Brown v. European & N. A. R. Co.* 58 Me. 384), of giving peremptory instructions to the jury to find for one party or the other (*Wittkowsky v. Wasson*, 71 N. C. 451; *Fort Scott Coal & Min. Co. v. Sweeney*, 15 Kan. 244); or of sustaining demurrers to the evidence, in cases where there is confessedly some evidence supporting a material issue. This is done under the guise of various expressions, which seem to leave the ancient prerogative of the jury intact. In Maryland, and perhaps other states, the judge achieves this result by determining the legal sufficiency of the evidence (*Cole v. Hebb*, 7 Gill & J. 20); and in Missouri by determining its legal effect. *Harris v. Woody*, 9 Mo. 113. See *Howard v. Smith*, 1 Jones & S. 128; *Myers v. Dixon*, 45 How. Pr. 48. See Thompson, Charging the Jury, § 30; 2 Bouvier, Law. Dict. title *Scintilla of Evidence*. It should be added that the drift of contemporary legal thought seems to sustain this latter view.

Other subdivisions of this topic will be found discussed in 2 Rice, Civil Evidence, p. 788 *et seq.*

CHAPTER XXVII.

EVIDENCE ON APPLICATION FOR A NEW TRIAL.

- § 170. *Preliminary Remarks.*
- 171. *Prevailing Practice Outlined.*
- 172. *In what Cases Granted.*
- 173. *What Evidence Should Show.*
- 174. *Doctrine of Anarchist's Case Stated.*
- 175. *Conflict in Evidence Ground for.*
- 176. *Insufficiency of the Evidence as Ground for.*
- 177. *Verdict against Weight of Evidence.*
- 178. *Newly Discovered Evidence.*
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- 180. *Statements of Prosecuting Attorney of Matters not in Evidence.*
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- 182. *Doctrine of Invited Error Considered.*
- 183. *Technical Errors Disregarded in Motion for.*
- 184. *Misconduct of Jury as Ground for.*
- 185. *Evidence of Irregularity in the Composition of the Grand Jury.*
- 186. *Evidence of the Record on Appeal.*
 - a. *Rules in Admitting and Excluding Evidence.*
 - b. *Consideration of the Exceptions.*
 - c. *When Exceptions are Deemed Waived.*

§ 170. **Preliminary Remarks.**—The law in its strenuous efforts to meet our various constitutional requirements, and to zealously guard the rights and privileges of a free people has prescribed many formulas of practice that it is beyond the scope and nature of this undertaking to even outline. Suffice it to say in this connection, that where these rules and formulas of practice have been disregarded and are ruthlessly ignored by the presiding judge, or where through inadvertence the counsel for either the defense or the prosecution, are allowed to indulge in argumentation unwarranted by the evidence, or in personalities and innuendoes prejudicial to the defendant's rights, it is always competent to show these infractions of legal methods to the appellate court, and to urge their consideration as grounds for a new trial. An

extended familiarity with criminal law will at once suggest the importance of these observations and the incidents of any extended practice are doubtless many where, upon such a showing made, the court of review has come to the relief of the prisoner, and rectified a manifest wrong in the interests of justice and humanity.

The point we wish to emphasize is this: Any failure to carefully observe the well recognized principles of criminal practice in the conduct of the trial constitutes reversible error.

But the courts do not lend an attentive ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that which leans against the former verdict ought always very strongly to preponderate. Chitty's Bl. Com. chap. 24, p. 391.

The records of our appellate courts abundantly establish the proposition that by far the most serious errors of the trial courts are connected with the charge to the jury. Error in this respect is a prolific source of disquietude not only to the prosecution, but in many instances to the court itself. The vagaries of the different judges even in the contracted sphere of definition frequently leads to perplexing and anomalous results, and it is by no means in the reception of improper evidence, or in the rejection of a pertinent offer to prove that reversible error is most frequently found. It is a truism which needs an apology for restatement that it is entirely competent to show any error in the presiding court; and any evidence which is calculated to disclose such error is always relevant and material, provided it is brought to the attention of the reviewing court in the appropriate and appointed manner. Indeed, it may be stated that this duty of charging the jury is rapidly rising into co-ordinate importance with the most intricate topics of criminal law.

§ 171. **Prevailing Practice Outlined.**—The prevailing prac-

tice with reference to new trial is concisely stated in the recitals of sections 462-466 inclusive of the New York Code of Criminal Procedure. The provisions of this enactment are reflected in similar statutory provisions in every state of the American Union. I append the full text of the sections referred to.

A new trial is the re-examination of the issue, in the same court, before another jury, after a verdict has been given.

The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument.

§ 172. **In what Cases Granted.**—The court in which a trial has been had upon an issue of fact has power to grant a new trial after a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

1. When the trial has been had in his absence, if the indictment be for a felony;

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a matter of law, or has refused to instruct them as prescribed in section four hundred and twenty; and the defendant has, at the trial, excepted to such misdirection or refusal;

6. When the verdict is contrary to law or clearly against evidence;

7. When it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as if before received would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence.

§ 173. **What Evidence Should Show.**—To entitle the accused to a new trial the evidence must clearly show that the result

reached by the trial court was unwarranted by the evidence and hence affects the substantial merits of the case. *Wilson v. People*, 94 Ill. 327; *Calhoun v. O'Neal*, 53 Ill. 354; *Leach v. People*, 53 Ill. 311; *Perteet v. People*, 70 Ill. 171.

§ 174. **Doctrine of Anarchist's Case Stated.**—"The tendency of legislation, as well as the decisions of the courts, is to have legal controversies of all kinds disposed of on their merits, and not upon mere technicalities." *Petty v. People*, 118 Ill. 157.

This doctrine is fully stated by *Mr. Justice Mulkey* in his opinion in the famous case of *Spies v. People*, 122 Ill. 266. He uses the following language:

"I desire to avail myself of this occasion to say from the bench that while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am nevertheless of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment.

"In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is that the errors are not more numerous and more serious than they are. In short, after having carefully examined the record and giving all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the state, and that it is fully warranted by the law and the evidence."

An inward persuasion has long been diffusing itself and now and then comes to utterance that the criminal classes of this country have been accorded too great a leniency in the universal habit hitherto prevailing of reversing the verdict upon the appearance of the least technical error in the record. We cannot regard with indifference that which has such high claims to a favorable consideration as does any well considered utterance of this exceedingly able court and if the views of the last paragraph were generally adopted, justice would be better served and crime more effectually punished.

§ 175. **Conflict in Evidence Ground for.**—In very many, if not most, criminal cases, there is a conflict of evidence upon material facts. It is primarily the province and duty of the jury to determine where the truth lies. There must, according to settled principles of criminal law, be a preponderance of evidence against the defendant, to authorize a conviction. It is the duty of juries to be guided by this rule. But on which side is the preponderance of evidence cannot be determined by fixed rules.

It must be left to the good sense of the jury, under proper instructions as to the law, to determine the question. The court may entertain some doubt, and in case of serious doubt, especially in a criminal case, it may order a new trial. But the mere fact that there is a conflict in the evidence is not alone sufficient. The court must reach the conclusion that injustice has probably been done on the trial before it is justified in setting aside the verdict.

§ 176. **Insufficiency of the Evidence as Ground for.**—An appellate court is, as a rule, reluctant to set aside a verdict on the ground of the insufficiency of the evidence. Insufficiency of the evidence is frequently alleged with nothing whatever to support the allegation. And should the appellate court favor this charge of insufficiency the final determination of a criminal cause would be indefinitely postponed. If the evidence tends to prove that the intent was as alleged in the indictment, the verdict will not be disturbed on the ground that the evidence failed to support the verdict. *People v. Connor*, 126 N. Y. 278; *People v. Estrada*, 53 Cal. 601; *Fry v. Com.* 82 Va. 334; *Bailey v. Com.* 82 Va. 107; *Glover v. Com.* 86 Va. 382. See Am. Dig. 1890, p. 3284, §§ 53–55; *People v. Lenon*, 79 Cal. 626. This much is clear.

When the evidence is insufficient in law to support a verdict, the refusal of the court to so instruct the jury, is good ground for a new trial. *Chase v. Breed*, 5 Gray, 443; *Com. v. Merrill*, 14 Gray, 418, 77 Am. Dec. 336; *Com. v. Packard*, 5 Gray, 101; *Denny v. Williams*, 5 Allen, 4; *Polley v. Lenox Iron Works*, 4 Allen, 329.

And similarly if the evidence in support of a criminal prosecution is so defective or so weak that a verdict of guilty based upon it cannot be sustained, the jury should be instructed to return a verdict of not guilty. Such a case arises when there is a material variance between the allegations and the proof.

In statutory form the rule assumes this language:

"If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant and they must follow the advice." N. Y. Code Crim. Proc. § 410.

The same strictness in regard to exceptions will not be enforced in criminal as in civil cases; but the court will look at the substance, with the view to promote justice. A motion in form for the absolute discharge of a prisoner may be regarded, as in substance, a request to direct an acquittal, or that the court instruct the jury, as matter of law, that the prisoner could not be convicted. *People v. Bennett*, 49 N. Y. 137.

"I can see no reason, why the court may not, in a case presenting a question of law only, instruct the jury to acquit the prisoner, or to direct an acquittal, and enforce the direction, nor why it is not the duty of the court to do so. This results from the rule that the jury must take the law as adjudged by the court, and I think it is a necessary result. It follows that a refusal to give such instruction or direction in a proper case is error." Church, J., in *People v. Bennett*, *supra*.

The familiar rule, that an appellate court will not disturb a verdict unless it is palpably against the evidence, must be restricted to civil cases. To say, that in a criminal case especially one involving a capital offense, such a rule should be indulged is in effect saying that the judgments of the Palatine Hill and of the Leteran Palace should be substituted for a "verdict by his peers." *Falk v. People*, 42 Ill. 331; *State v. Sopher*, 70 Iowa, 494; *Owens v. State*, 35 Tex. 361; *People v. Kohler*, 49 Mich. 324; *Turner v. State*, 38 Tex. 169; *State v. Miller*, 10 Minn. 313; *State v. Webb*, 41 Tex. 68; *Manuel v. People*, 48 Barb. 548; *Copeland v. State*, 7 Humph. 479; *People v. Lewis*, 36 Cal. 531; *Cochran v. State*, 7 Humph. 544; *State v. Packwood*, 26 Mo. 340; *Leake v. State*, 10 Humph. 144; *Sargent v. People*, 64 Ill. 327; *State v. Tomlinson*, 11 Iowa, 401; *Milton v. State*, 6 Neb. 138. In the two last above cases the judgments were reversed, because there was not sufficient evidence of deliberation and premeditation.

Formerly in criminal cases courts should not grant new trials on such grounds. Now, by the express terms of the law, a motion for that purpose can be made, and an appeal from the judg-

ment brings up for review the decision of such motion as well as the proceedings upon the trial. The power of interfering with the verdict in a criminal case is doubtless to be exercised with caution, especially where the question of fact to be determined is one incapable of direct proof and only to be established by inference from other facts. *People v. Mangano*, 29 Hun, 259.

A conviction that is clearly against the weight of evidence discloses fatal defects, and will be set aside on appeal. *State v. Lyon*, 12 Conn. 487; *People v. San Martin*, 2 Cal. 484; *State v. Anderson*, 2 Bail. L. 565; *Lewis v. Payn*, 4 Wend. 423; *State v. Bird*, 1 Mo. 417; *Murray v. Rable*, 4 Hayw. (Tenn.) 203; *Ball v. Com.* 8 Leigh, 726; *Haynes v. Wright*, 4 Hayw. (Tenn.) 63; *Bedford v. State*, 5 Humph. 553; *State Bank v. Holcomb*, 12 N. J. L. 219; *Com. v. Briggs*, 5 Pick. 429; *Oram v. Bishop*, 12 N. J. L. 177; *D'Ayrolles v. Howard*, 3 Burr. 1385; *Coffin v. Phoenix Ins. Co.* 15 Pick. 291; *Rex v. Malden*, 4 Burr. 2135; *Hammond v. Wadhams*, 5 Mass. 353; *Copeland v. State*, 7 Humph. 479; *Wait v. M'Neil*, 7 Mass. 261; *Curtis v. Jackson*, 13 Mass. 507; *Bartholomew v. Clark*, 1 Conn. 472; *Kinne v. Kinne*, 9 Conn. 102; *Talcott v. Wilcox*, 9 Conn. 134; *Bacon v. Parker*, 12 Conn. 212; *Lloyd v. Newell*, 8 N. J. L. 365; *Mann v. Clifton*, 3 Blackf. 304; *Hoagland v. Moore*, 2 Blackf. 167; *Daniel v. Prather*, 1 Bibb, 484; *State v. Sims*, 2 Bail. L. 29; *Respublica v. Lacaze*, 2 U. S. 2 Dall. 118, 1 L. ed. 313; *Corbett v. Brown*, 8 Bing. 33; *Zube v. Geigar*, 2 Yeates, 522; *Gibbs v. Tucker*, 2 A. K. Marsh. 219; *Hughes v. Howard*, 3 Har. & J. 9; *Newson v. Lycan*, 3 J. J. Marsh. 440; *Farrant v. Olmius*, 3 Barn. & A. 692.

Rapalje says: "If there is any evidence to support the verdict the appellate court will not interfere. *Russell v. State*, 68 Ga. 785. A judgment of conviction will not be reversed merely because the jury disregarded irreconcilable evidence; (*King v. State*, 4 Tex. App. 256, 30 Am. Rep. 160; *Jones v. State*, 5 Tex. App. 86; *Satterwhite v. State*, 6 Tex. App. 609) or because of a conflict of evidence. *Murphy v. State*, 15 Neb. 383. To warrant a reversal the evidence must preponderate against the verdict (*Robertson v. State*, 4 Lea, 425; *Fitzhugh v. State*, 13 Lea, 258) and even then a reversal does not necessarily follow. *State v. Quinton*, 59 Iowa, 362. Where the verdict finds defendant guilty of one offense and the evidence indicates another, the conviction will be reversed (*State v. Craft*, 72 Mo. 456), as it will be when

evidently founded on mere suspicion of guilt not upheld by the evidence. *Morrison v. State*, 13 Neb. 527." Rapalje, Crim. Proc. § 408.

The authorities are simply overwhelming, that in a criminal case, and more especially in a capital case, the verdict will be set aside when it is contrary to the weight of evidence. The rule that the court will not, on appeal, set aside a verdict on the ground that the evidence is not sufficient to sustain it, has been generally adopted in civil cases. But that rule has never been recognized in a capital case. In *State v. Hunsaker*, 16 Or. 497, the opinion is expressed, without deciding the point, that the power of the court, in criminal cases, to look into the evidence to see whether the verdict is justified by it or not, is beyond doubt; and in *State v. McGinnis*, 17 Or. 332, the court felt it a duty, inasmuch as it was a capital case, to examine the record and see whether there was any error or any ground whatever for the appeal, although the usual practice would have been to affirm the judgment, there being no brief nor appearance on appeal. In *Anderson v. State*, 43 Conn. 514, where there was a conviction of murder in the first degree, the court directs a new trial, and says: "If we are to make a rigid application of the rules which govern the superior court in civil causes, we should doubtless advise that a new trial should be denied; but in a case where a human life is at stake, justice, as well as humanity, requires us to pause and consider before we apply those rules in all their rigor.

In *State v. Clements*, 15 Or. 243, which was not a capital case, the court say the sufficiency of the evidence to sustain the verdict will be considered on appeal when the point is presented by exception. In a capital case, however, the court will review the instructions that were given, although no exceptions were taken or saved to the rulings of the court by the defendant. *State v. Packwood*, 26 Mo. 341; *Falk v. People*, 42 Ill. 335. And so too where the defendant's counsel did not ask the court to charge the jury as they should have been charged, and the court doubted whether the question was presented so that it could consider it, nevertheless, the case being a capital one, the court did consider it and reversed the judgment. *State v. Johnson*, 40 Conn. 142; *People v. Levison*, 16 Cal. 99, 76 Am. Dec. 505. In *People v. Bowers*, 79 Cal. 415, a very recent California case, the court reviewed the evidence in a capital case, where it was conflicting,

and granted a new trial. *State v. Forsythe*, 89 Mo. 669; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318.

The appellate court will refuse to entertain a motion for a new trial on the ground of the insufficiency of evidence, when it appears that some proof was offered in the court below which tends to sustain the verdict rendered. This is well settled law. Wherever there is some evidence to sustain the material points of the indictment, there will be no reversal of the verdict. This position has been reaffirmed as late as 1891 by the appellate court of Indiana in the case of *Baker v. State*, 2 Ind. App. 517.

§ 177. **Verdict against Weight of Evidence.**—In *Ross v. Overton*, 3 Cal. 309, 2 Am. Dec. 552, *Judge* Roane, delivering the resolution of the whole court, laid down the principle (in language which has since been cited and approved in many cases) thus: A new trial, on the ground that the verdict is contrary to evidence, “ought to be granted only in case of a plain deviation, and not in a doubtful one, merely because the court, if on the jury, would have given a different verdict; since that would be to assume the province of the jury, whom the law has appointed the triers.” In *Brugh v. Shanks*, 5 Leigh, 598, *Judge* Carr, after quoting the above language of *Judge* Roane, says: “These remarks are applied to the court which presides at the trial, and has all the advantages (possessed by the jury) of seeing and hearing the witnesses; how much more strongly do they apply to an appellate court, deprived of these all important aids in eviscerating truth? But here they apply to *a multo fortiorari*; for not only have the triers appointed by law found the verdict, but the court which heard the witnesses has refused the new trial. In such a case the ‘deviation’ must be gross and palpable indeed, before I could agree to interfere with the verdict.”

Upon an application of this kind the appellate court is always loth to disturb the judgment of the court below. On this point, *Christian, J.*, delivering the opinion in *Pryor v. Com.* 27 Gratt. 1010, said: “We should act with great caution in granting new trials in cases where the new trial is asked solely upon the ground that the verdict is contrary to the evidence, and great weight is always given and justly so, to the verdict of the jury and judgment of the court in which the case is tried. The cases are very rare in which this court interferes, and it is only in a case where the evidence is plainly insufficient to warrant the finding of the jury.” *McDaniel v. Com.* 77 Va. 281.

It is not enough to justify interference with the verdict that the court on the case before it can see that the evidence made the case a conflicting or doubtful one, demanding the solution of a verdict to settle the doubt or conflict; but it must be quite apparent that the conflict has been settled by a verdict against the substantial and preponderating weight of evidence.

It was said by Brady, *J.*, in *People v. Panniza*, N. Y. (not rep.) that "justice requires a new trial whenever the court can perceive in reviewing all the evidence, either that a verdict of acquittal should have been rendered or that the jury were led by reason of prejudice into convicting the defendant of a grade of offense altogether unwarranted by the evidence." See also *Prather v. Com.* 85 Va. 122. It is perhaps superfluous to add that where the verdict is wholly unsupported by the evidence the appellate court will reverse. *State v. Hunt*, 91 Mo. 490.

Where one was convicted of an assault on his wife with intent to kill and murder her, and the proof was clear that the accused did shoot his wife, it was held, that the question whether the shooting was an accident, or was intentional, was a question of fact for the jury; and that when they have settled that fact adversely to the defendant, without passion or prejudice, in accordance with the evidence, it was not the province of an appellate court to disturb the verdict. *Dunn v. People*, 109 Ill. 635.

§ 178. Newly Discovered Evidence.—After discovered evidence, in order to afford a proper ground for the granting of a new trial, must possess the following qualifications:

It must have been discovered since the former trial.

It must be such that a reasonable diligence on the part of the defendant could not have secured it at the former trial.

It must be material in its object, and not merely cumulative and corroborative, or collateral.

It must be such as ought to produce, on another trial, an opposite result on the merits.

It must go to the merits, and not rest on merely a technical defense. *State v. Carr*, 21 N. H. 166; *Com. v. Murray*, 2 Ashm. 41; *Com. v. Williams*, 2 Ashm. 69; *Thompson v. Com.* 8 Gratt. 637; *Read v. Com.* 22 Gratt. 924; *Carter v. State*, 46 Ga. 637; *State v. Burnside*, 37 Mo. 343; *State v. Wyatt*, 50 Mo. 309; *Moore v. Philadelphia Bank*, 5 Serg. & R. 41; Whart. Crim. Pl. & Pr. § 855.

Where the refusal to grant a new trial on the ground of newly discovered evidence is a matter largely within the discretion of the trial court, yet, if it appears that the evidence is material, and could not have been discovered with reasonable diligence, the supreme court will reverse the ruling. Where the object of evidence is to prove an alibi, the rule making newly discovered cumulative evidence insufficient to command a new trial has no application. *State v. Stowe*, 14 L. R. A. 609, 3 Wash. 206.

New trials for newly discovered evidence ought only to be granted after the most careful scrutiny of the evidence alleged to have been discovered, and when it raises a violent presumption that a different result would be reached upon a second trial. *Thomp. Trials*, § 2759; *Hines v. Driver*, 100 Ind. 315; *Cooper v. State*, 120 Ind. 377.

A new trial should not be granted upon the application of defendant, where the alleged newly discovered evidence is inconsistent with the testimony of the defendant on the former trial. *People v. Hovey*, 1 N. Y. Crim. Rep. 324. And evidence which existed and was known to defendant before the former trial cannot be considered newly discovered, because he has since discovered that it might have been important if used on the trial. *People v. Hovey*, *supra*. So if the accused relies, for the purpose of proving the character of the crime, upon the condition of his mind at the time of doing the act, he must proceed upon the trial to establish that condition by the production of all the evidence bearing upon the question within his knowledge, or which he could have procured by proper diligence. And, although there was the grossest laches, still, if the evidence was important, the court, in a case in which human life is at stake, should be very guarded in depriving the prisoner of the slightest right he may possess. Evidence merely cumulative in its character, can never afford proper ground for a new trial. *People v. Biles*, 5 West Coast Rep. 829; *State v. Hyland*, 19 West Coast Rep. 622.

§ 179. **Admission of Illegal Evidence as Ground for.**—The reception of illegal evidence is presumptively injurious to the other party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same if the objectionable proof had been rejected, the error furnishes no ground for reversal. Many of the

earlier cases in New York favored a departure from the English rule on this subject, and maintained that it was impossible to determine whether the evidence improperly received might not have had a controlling influence upon the jury. *Marquand v. Webb*, 16 Johns. 89; *Osgood v. Manhattan Co.* 3 Cow. 621; *Clark v. Vorce*, 19 Wend. 232; *People v. Wiley*, 3 Hill, 214. The later decisions have modified this doctrine, in harmony with the general current of English and American authority, and we think they rest upon sound principles. The intendment is, that an error of the judge, whether in the admission of evidence or in his instructions to the jury, was prejudicial to the party, but there is no more difficulty in the one case than in the other, in determining, upon the whole record, whether, in the particular case, such intendment is repelled. Where it is apparent and obvious that the supposed error did not and could not affect the result, nor work either injury or injustice to the party accused, it does not call for a reversal of the conviction. *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286; *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 246; *Forrest v. Forrest*, 25 N. Y. 510; *Smith v. Paton*, 31 N. Y. 66; *State v. Ford*, 3 Strobb. L. 517, note; *Rex v. Ball*, Russ. & R. 132; *Rex v. Tinkler*, 1 East, P. C. 384; *Horford v. Wilson*, 1 Taunt. 12; *Doe v. Tyler*, 6 Bing. 561; *Rutzen v. Farr*, 4 Ad. & El. 53; *Wright v. Doe*, 7 Ad. & El. 313; *Nathan v. Buckland*, 2 Moore, 153; *Stiles v. Tilford*, 10 Wend. 339; *Page v. Ellsworth*, 44 Barb. 640; *People v. McCann*, 16 N. Y. 61, 69 Am. Dec. 642; *Marchy v. Shultz*, 29 N. Y. 356; *People v. Bransby*, 32 N. Y. 525.

§ 180. **Statements of Prosecuting Attorney of Matters not in Evidence.**—In civil cases an argument to the jury not based on evidence, made against objection, will be ground for a new trial. *Rolfe v. Rumford*, 66 Me. 564; *Tenny v. Mulvaney*, 8 Or. 522; *Tucker v. Henniker*, 41 N. H. 318. In criminal cases the rule is more stringent. *Ferguson v. State*, 49 Ind. 33; *People v. Quick*, 58 Mich. 324; *People v. Dane*, 59 Mich. 552; *State v. King*, 44 Mo. 238. It is the duty of the court to stop the district attorney on its own motion when he states facts not before the jury, or uses vituperation and abuse predicated upon alleged facts not in evidence, and calculated to create prejudice to the prisoner. *State v. Gutekunst*, 24 Kan. 252; *Jenkins v. North Carolina Ore Dressing Co.* 65 N. C. 563; *State v. Williams*, 65 N. C.

505; *State v. Smith*, 65 N. C. 369. A new trial was ordered where the court sustained an objection to the language, and admonished the attorney that it was improper. *Long v. State*, 56 Ind. 186; *State v. Graham*, 62 Iowa, 108. Where the court in a capital case interfered, rebuked the attorney, and instructed the jury to pay no attention to the statements, but it was impossible to say that no injury resulted to the defendants therefrom, a new trial was granted. *People v. Bowers*, 79 Cal. 415.

A very remarkable case illustrative of these remarks is reported in *State v. Olds*, 19 Or. 397. The case was one of homicide, and was invested in many theatrical incidents owing to the prominence of the parties, and the additional fact that the bunco fraternity of two states had combined to effect the release of the accused.

It was vehemently contended by the district attorney in his address to the jury, that the gamblers in Portland were at the bottom of the affair, that they had compassed the death of Weber, had employed Olds to carry out their design, and raised money to clear him and defeat the ends of justice. And he strongly intimated that the police force of the city had lent its aid and influence to further the scheme.

This harangue of the district attorney to the jury was highly sensational, and served, no doubt, to incite their passions and prejudice against the accused; but, unless justified by the evidence, was quite out of place. The trial of a fellow being for murder, where the penalty is death, devolves a grave responsibility upon the attorney for the state as well as upon the court and jury, and a conviction should never be urged unless justified by the proof, fairly weighed and considered. It is to ascertain the truth and apply the law, and a resort to imagination or fancy in order to incite the passions and prejudices of the triers, is a deviation from the true and proper course. To convict and put to death a human being through the influence of prejudice and caprice is morally murder, and more pernicious in its consequences by far, than the escape of a guilty person; and the forms of law should never be prostituted to such a purpose.

It has been held repeatedly that the court has no authority to review the decision upon a motion for a new trial; and has been intimated very strongly a number of times that the question as to the sufficiency of evidence to support the judgment or con-

viction, must have been first passed upon in the trial court. Where the evidence in a capital case is shown to be clearly insufficient to warrant a conviction, it would be the duty of this court, under its supervisory power over the circuit courts, to reverse the conviction and order a new trial. "It is," says Blackstone, "the noble declaration of the law that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular." Bl. Com. (Cooley's ed.) 354; *State v. Olds*, 19 Or. 397.

Our extended comment on the foregoing case is fully warranted in view of the frequency with which the records in criminal cases under the review of the appellate court are encumbered with allegations touching the error of the trial court in tolerating the respective counsel in commenting upon the case as to matters not warranted by the evidence. In further exposition of this point I cite a case from California where the error complained of infected the record through the joint effort of the prosecuting attorney and the trial court. On the reversal the court says: "Unfortunately, the judge allowed himself rather frequently to question the witnesses, always in the interest of the prosecution, and often by putting questions which were leading and suggestive. We think the jury would be sure to get the impression that the judge thought the defendant guilty. Still more objectionable was the conduct of the prosecuting attorney. It is true, the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were all calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom. We think, upon a careful examination of the record, that the interests of justice require a new trial before a judgment of this gravity should be carried into execution." *People v. Bowers*, 79 Cal. 415.

The Illinois supreme court has placed the brand of condemnation upon a very common method much in vogue among our prosecuting attorneys. I refer to the almost universal habit of commenting upon the failure of the accused to take the witness stand. Upon this subject the court says:

"It is to be regretted that counsel who assisted the prosecuting attorney referred, in his argument to the jury, to the fact that plaintiff in error was not placed on the stand as a witness, as one

of the reasons why he should be convicted. It is true, that when stopped by the court, he said it was inadvertently done, and the jury were directed by the court to disregard it, who can know what effect it may have had on the jury in forming their verdict? Such comments are prohibited by the statute, and it is strange that any attorney should so far forget the rights of the accused, and his professional duty, for a moment, even in the heat of discussion; but he said it was inadvertent, and we are loth to believe that any attorney would intentionally act so unfairly and unprofessionally. We cannot conceive that any member of the bar could deliberately seek by such means to wrongfully procure a conviction and the execution of a fellow being, when his highest professional duty to his client only requires him to see that there is a fair trial according to the law and the evidence. Where such things are done, whether intentionally or inadvertently, it may make an impression on the minds of the jury that nothing can remove. And who can say that this inadvertence may not have produced the verdict of guilty?" *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132.

Improper language of prosecuting attorneys has frequently been made the basis of severe animadversion by the Missouri courts. *State v. Mahly*, 68 Mo. 316; *State v. Lee*, 66 Mo. 165; *State v. Reed*, 71 Mo. 200; *State v. Martin*, 74 Mo. 547. See also *Cross v. State*, 68 Ala. 476; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *State v. Jackson*, 95 Mo. 623.

§ 181. **Failure to Object to the Admission of Improper Evidence no Ground For.**—Where evidence that is objectionable is permitted to go to the jury without objection, and it is such as will prove a fact, a verdict founded on it will be sustained. This is in harmony with the general rule substantially thus stated by some of the authorities: "A party objecting to a variance between the pleadings and the proof must make his objection at the proper time during the trial, and, if he does not, he cannot afterward avail himself of the objection." *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Manice v. Brady*, 15 Abb. Pr. 173; *Shall v. Lathrop*, 3 Hill, 237; *Pike v. Evans*, 15 Johns. 213; *Doyle v. Mulren*, 7 Abb. Pr. N. S. 258. In *Roberts v. Graham*, 73 U. S. 6 Wall. 578, 18 L. ed. 791, the Supreme Court of the United States said: "The objection of a variance not taken at the trial, cannot avail the defendant as an error in the

higher court, if it could have been obviated in the court below; nor can it avail him on a motion for a new trial." This general doctrine was applied in a criminal case in *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474. It has often been held that a verdict will be sustained on evidence which would have been excluded had proper objection been made. *Stockwell v. State*, 101 Ind. 1; *Riehl v. Evansville Foundry Asso.* 104 Ind. 70; *Yeager v. Wright*, 112 Ind. 230; *McFadden v. Fritz*, 110 Ind. 5; *Indiana, B. & W. R. Co. v. Finnell*, 116 Ind. 414.

Without intimating that the decisions last cited are not declaratory of the law, is it not obvious that at least in the trial of a capital case, a conviction based upon illegal evidence should be set aside?

"If the evidence, although not strictly admissible, is not of a character to damage the defendant, or, as it has been otherwise expressed, if the court can clearly see that the error has not influenced the result, it is no ground for a new trial." *Draper v. State*, 4 Baxt. 254; *Wilson v. Smith*, 5 Yerg. 381; *Clark v. Rhodes*, 2 Heisk. 206; *Maddin v. Head*, 1 Lea, 664; *McAdams v. State*, 8 Lea, 463.

"And ordinarily, when a prisoner's guilt is made out clearly by positive testimony, it should be no ground for a new trial that evidence was introduced which was not strictly admissible, if the court can see that the defendant was not prejudiced thereby." *McAdams v. State*, *supra*; *Turner v. State*, 89 Tenn. 547.

§ 182. **Doctrine of Invited Error Considered.**—If the party opens the door to the admission of incompetent evidence he is in no plight to complain that his adversary followed through the door thus opened. *Perkins v. Hayward*, 124 Ind. 445. See similar rulings of the same court in the cases of *Lowe v. Ryan*, 94 Ind. 450; *Meranda v. Spurlin*, 100 Ind. 380; *Hinton v. Whitaker*, 101 Ind. 344; *Dinwiddie v. State*, 103 Ind. 101; *Hobbs v. Tippecanoe County Comrs.* 116 Ind. 376; *Nitche v. Earle*, 117 Ind. 270; *Mosier v. Stoll*, 119 Ind. 244.

Judge Elliott in *Dinwiddie v. State*, *supra*, says of the question involved in that case: "As the question comes to us we can not say that the appellants did not, on cross-examination, introduce evidence of the same character as that which they now seek to make available for a reversal of this judgment. Nor can we presume that there was nothing done making the evidence com-

petent without a departure from settled and familiar principles. It is, and long has been, a settled rule that all reasonable intentions will be indulged in favor of the ruling of the trial court. So, too, it is well settled that a party who seeks to overthrow the judgment of a court must affirmatively show an erroneous ruling and that it was prejudicial to him. It is evident that, under these settled rules, the appellants cannot successfully demand a reversal of the judgment upon the ground that there was error in admitting the testimony to which we have referred, for it does not affirmatively appear that there was error of which they can take advantage, nor is the presumption which we are bound to yield to the rulings of the trial court overthrown. We do not decide whether the evidence was or was not *per se* incompetent; we decide that the record does not show that the appellants are in a situation to successfully make any question upon its intrinsic character."

It is an error of law to find a material fact when there is a total absence of evidence to sustain it, and that error of law is reviewable in the appellate court upon due and proper exceptions. *Murray v. Harway*, 56 N. Y. 337; *Duffy v. Masterson*, 44 N. Y. 557; *Mason v. Lord*, 40 N. Y. 477; *Pollock v. Pollock*, 71 N. Y. 137.

§ 183. **Technical Errors Disregarded in Motion for.**—In *Ritzman v. People*, 110 Ill. 363, the court says:

"If it is not already understood, it is high time it should be, that where a case is clearly made out against the accused, and the jury have so found, this court will not reverse for a mere technical error, which it can see could not have affected the result."

Taylor, in the recent edition of his work on the law of evidence, in speaking of the scope and meaning of substantial justice, says that—

"Even judges are beginning to discover that substantial justice is of more real importance than mere technical precision. Wise men should ever bear in mind that the objects of the acts which authorize amendments in criminal proceedings is to render punishment more certain by neutralizing the effect of trivial variances, which have constantly protected the wrong-doer.

"So long as the least rational doubt exists respecting the guilt of a prisoner, it is only fair that the ample shield of justice should screen him from injury; that jurors should weigh with jealousy the evidence against him, and judges should see more clearly that

the act with which he is charged is an offense against the law. But when courts of justice go further than this and permit the law to be defeated by technical errors, which cannot by possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule. In civil causes, the rules authorizing amendments receive a liberal construction, and properly so. Why, then, should an absurdly strict construction be applied in criminal courts? The statutes themselves warrant no such distinction, and to introduce into the interpretation of them the old doctrine, *strictissimi juris*, is to misunderstand and misapply the meaning of that doctrine and to make the commandments of the legislature of more effect through your traditions." The foregoing reasoning may be relied upon to support the rule now well understood that no new trial can be granted for newly discovered evidence which merely tends to discredit a witness. *Hunt v. State*, 81 Ga. 140.

In Cooley, Const. Lim. (5th ed.) 504, 505, it is laid down: "It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case." *Kelly v. People*, 115 Ill. 583.

The tendency of modern legislation, as well as judicial decision, is to do away, as far as possible, with the subtle and refined distinctions of the common law, when they interfere with substantial justice. *Hutchinson v. Com.* 82 Pa. 472. And what makes this proposition so peculiarly offensive to the criminal classes is the impossibility of refuting it.

§ 184. **Misconduct of Jury as Ground for.**—A defendant in a criminal case is not entitled to a new trial merely because there is evidence showing the misconduct of a juror, unless it be shown that such misconduct was prejudicial to the rights of the defendant, or such a state of facts is shown from which it may fairly be presumed that the defendant's rights were prejudiced. *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756; *Mergentheim v. State*, 107 Ind. 567; *Riley v. State*, 95 Ind. 446; *Cooper v. State*, 120 Ind. 377; *Drew v. State*, 124 Ind. 9.

The same conclusion was reached in *People v. Menken*, 36 Hun,

91, 3 N. Y. Crim. Rep. 233, where it was held that a verdict of a jury in a criminal case will not be set aside for irregularity or improper conduct upon the part of jurors, unless it be shown that the defendant was prejudiced thereby.

Where subsequent to the verdict the alienage of one of the jurors is shown, while that fact would have been a just ground for challenge, it is no reason for avoiding the verdict and granting a new trial; nor where a juror has been shown to have expressed a disqualifying opinion as to the subject-matter of the trial; or where he was not a citizen of the county or state, or is shown to have been related to the accused within the prohibited degrees. *Brown v. La Crosse, C. G. L. & C. Co.* 21 Wis. 51; *State v. Shelledy*, 8 Iowa, 477; *Hollingsworth v. Duane*, 4 U. S. 4 Dall. 353, 1 L. ed. 864; *State v. Quarrel*, 2 Bay, 150, 1 Am. Dec. 637; *State v. Howard*, 17 N. H. 171; *Simpson v. Pitman*, 13 Ohio, 365; *Presbury v. Com.* 9 Dana, 203; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Jones v. People*, 2 Colo. 351; *Chase v. People*, 40 Ill. 352; *Mt. Desert v. Cranberry Isles*, 46 Me. 411; *Hull v. Albroy*, 2 Disney, 147; *Romaine v. State*, 7 Ind. 67; *Thompson v. Page*, 16 Cal. 78; *Roseborough v. State*, 43 Tex. 570; *Costly v. State*, 19 Ga. 614; *Kennedy v. Com.* 14 Bush, 340; *McLellan v. Crofton*, 6 Me. 307; *Orme v. Pratt*, 4 Cranch, C. C. 124; *Taylor v. Greeley*, 3 Me. 204; *Baker v. State*, 4 Tex. App. 227; *Smith v. Earle*, 118 Mass. 531.

Where the attorney for the accused fails to inquire as to the alienage and competency of a juror at the time the trial jurors are being selected, such failure will be construed as a waiver of the defendant's right to challenge. *Jeffries v. Randall*, 14 Mass. 205; *State v. Funck*, 17 Iowa, 365; *Estep v. Wattrous*, 45 Ind. 140; *State v. Shelledy*, *supra*; *Alexander v. Dunn*, 5 Ind. 122; *Keener v. State*, and *Chase v. People*, *supra*; *State v. Patrick*, 3 Jones, L. 443; *Collier v. State*, 20 Ark. 36; *Croy v. State*, 32 Ind. 384; *Wilder v. State*, 25 Ohio St. 555; *Tweedy v. Briggs*, 31 Tex. 74; *Beck v. State*, 20 Ohio St. 228; *State v. Parks*, 21 La. Ann. 251.

It is erroneous to allow the jury, after retiring to consider of their verdict, to have access to law books of any description. They must get their instructions as to the law of the case from the court, and not from their own perusal of the books. *Johnson v. State*, 27 Fla. 245.

It has been held that a new trial should be granted for misconduct of the jury in consulting law books on the crime of rape during their deliberations. *Proffatt*, Jury Trials, 404; *Merrill v. Nary*, 10 Allen, 416; *State v. Smith*, 6 R. I. 33; *Harrison v. Hance*, 37 Mo. 185; *Newkirk v. State*, 27 Ind. 1; *Burrows v. Unwin*, 3 Car. & P. 310; *Hartung v. People*, 4 Park. Crim. Rep. 319, affirming 8 Abb. Pr. 132, 17 How. Pr. 85; *Manuel v. People*, 48 Barb. 548; *Coffin v. Gephart*, 18 Iowa, 256; *Mitchell v. Carter*, 14 Hun, 448; *Taylor v. Betsford*, 13 Johns. 487; *Lott v. Macon*, 2 Strobb. L. 178.

In a very recent case reported from the state of Washington, it was conceded that, while the rule that the separation of the jury in a criminal case prior to the receipt of its verdict by the court was a misconduct which would entitle the defendant to a new trial was a good one when made, and could not be disregarded at that time without greater danger of seriously prejudicing the substantial rights of the defendant, as then the jury could not render a written verdict in a criminal case, but must render it *ore tenus*, and that, under such a provision of law, if a jury were permitted to separate prior to the rendering of the verdict, they might be subjected to influences dangerous to society and subversive of the rights of the defendant. *Anderson v. State*, 2 Wash. 183.

Where the proof of drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict, in a capital case, a verdict of conviction should not be allowed to stand. This rule is recommended by considerations far too obvious to require formal justification. See *People v. Gray*, 61 Cal. 164, 183, 44 Am. Rep. 549; *Leighton v. Sargent*, 31 N. H. 119, 34 Am. Dec. 324; *Brant v. Fowler*, 7 Cow. 562; *People v. Douglass*, 4 Cow. 26; *Wilson v. Abrahams*, 1 Hill, 207; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *State v. Baldy*, 17 Iowa, 39; *Ryan v. Harrow*, 27 Iowa, 494, 1 Am. Rep. 302; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *State v. Bullard*, 16 N. H. 139; *Pelham v. Page*, 6 Ark. 535; *Gregg v. McDaniel*, 4 Harr. (Del.) 367.

In the case of *People v. Douglass*, *supra*, the court said: "It will not do to weigh and examine the quantity which may have been taken by the juror, nor the effect produced." And in *Leighton v. Sargent*: "For the cause that brandy was furnished

to the jury, and drunk by several of them, while deliberating upon the cause, after retiring to form their verdict, we think the verdict must be set aside. The quantity drank was probably small, but we cannot consent that that fact should make a difference."

So in *State v. Baldy*, 17 Iowa, 39: "The parties have a clear right to the cool, dispassionate and unbiased judgment of each juror, applied to the determination of the issues in the cause; and the use in any degree of that which stimulates the passions, and has a tendency to lessen the soundness of judgment, is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced in not having it, as perfect as it existed in the juror when accepted, applied to the determination of the cause. If this is true as a general rule, and as applicable to civil cases, *a fortiori* is the rule applicable in criminal cases, and especially in this case, in which the offense charged involves obedience to passions stimulated more than others by the use of spirituous liquors, and, of course, in its correct determination, requiring the most careful guarding against undue influence from them." *People v. Lee Chuck*, 78 Cal. 317.

After a careful examination of the subject, the general doctrine is announced as this: "A verdict will not be vacated, even in a capital case, on account of the misconduct or irregularity of the jury, unless it be such as might affect their impartiality or disqualify them from the proper exercise of their functions." *Titus v. State*, 49 N. J. L. 36.

§ 185. **Evidence of Irregularity in the Composition of the Grand Jury.**—Chitty, in his work on Criminal Law, vol. 1, p. 307, says: "It is perfectly clear that all persons serving upon the grand jury must be good and lawful men; by which it is intended that they must be liege subjects of the King, and neither aliens nor persons outlawed even in a civil action; attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous. And if a man who lies under any of these disqualifications be returned he may be challenged by the prisoner before the bill is presented. or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which purpose he may be allowed the assistance of counsel on producing in court the record of the outlawry, attainder, or conviction, on which the incompetence of the jurymen rests."

This is, undoubtedly, the general rule as to the manner in which objection may be taken to the personnel of the grand jury though in this country a motion to quash the indictment may be made instead of pleading specially in abatement. The requirement of answering over to the felony in connection with the plea in abatement is for the benefit of the accused, in order that he may not be concluded on the merits if he should fail in sustaining his special plea; a precaution which probably would not be necessary in our practice. *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857.

The method of selecting, drawing, summoning and impaneling a grand jury or a trial jury, is prescribed by statutory law. *Wynehamer v. People*, 13 N. Y. 427; *Young v. State*, 6 Ohio, 436; *Cruger v. Hudson River R. Co.* 12 N. Y. 199; *People v. Duff*, 65 How. Pr. 365; *McQuillen v. State*, 8 Smedes & M. 587. And any evidence tending to show the failure in the observance, the statutory recital is competent. The personnel of the grand jury must comply with the law in order to constitute a legal body; and any indictment found by a panel drawn in contravention of the law is a mere nullity. *Clare v. State*, 30 Md. 164; *State v. Symonds*, 36 Me. 128; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740; *Chase v. State*, 20 N. J. L. 218; *Whitehead v. Com.* 19 Gratt. 640; *Rawls v. State*, 8 Smedes & M. 599; *McQuillen v. State*, 8 Smedes & M. 599; *Stokes v. State*, 24 Miss. 621; *Barney v. State*, 12 Smedes & M. 68; *Miller v. State*, 33 Miss. 356; *Doyle v. State*, 17 Ohio, 222; *State v. Williams*, 5 Port. (Ala.) 130; *Finley v. State*, 61 Ala. 201; *Scott v. State*, 63 Ala. 59; *Berry v. State*, 63 Ala. 126; *Couch v. State*, 63 Ala. 163; *State v. Conner*, 5 Blackf. 325; *Dutell v. State*, 4 G. Greene, 125; *State v. Jennings*, 15 Rich. L. 42; *State v. Pratt*, 15 Rich. L. 47; *State v. Bryce*, 11 S. C. 342; *Wilburn v. State*, 21 Ark. 198; *State v. Morgan*, 20 La. Ann. 442; *State v. Jacobs*, 6 Tex. 99; *Barton v. State*, 12 Neb. 260; *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

In *State v. Wood*, 53 N. H. 484, Sargeant, *Ch. J.*, states the weight of authority now to be, "that a grand juror may be compelled to testify when necessary to promote the cause of the justice, what the witnesses before the grand jury testify to, either to contradict such witnesses or otherwise."

In *State v. Benner*, 64 Me. 267, the court says: "But the oath of the grand juror does not prohibit his testifying what was

sworn before the grand jury, when the evidence is required for the purposes of public justice or the establishment of private rights. . . . So in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses. Such seems the result of the most carefully considered decisions in this country."

In *Burdick v. Hunt*, 43 Ind. 381, it is said that "the oath of grand jurors does not prevent the public, or an individual, from proving by one of the jurors, in a court of justice, what passed before the grand jury."

In *Jones v. Turpin*, 6 Heisk. 181, it is said that "when these ends have been accomplished the entire purpose of secrecy is effected, and if at a subsequent period it shall become necessary to the attainment of justice and the vindication of truth and right in a judicial tribunal that the conduct and testimony of prosecutors and witnesses shall be inquired into, there is no reason why it should not be done."

In *Gordon v. Com.* 92 Pa. 216, 37 Am. Rep. 672, it is said that "on no sound principle can it be said that a witness who has testified before a grand jury shall be permitted to claim that his evidence was a privileged communication, so that it shall not be shown under the direction of the court, whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights."

"When for the purposes of public justice, or for the protection of private rights, it becomes necessary, in a court of justice, to disclose the proceedings of the grand jury, the better authorities now hold that this may be done. It is obvious that there are certain transactions of the grand jury room which it can never be for the interests of justice to disclose; for example, what particular jurors concurred in or opposed the finding of the indictment, what opinions were expressed by various members of the body. In respect to such matters the injunction of secrecy may well be perpetual." *Thomp. & M. Juries*, § 703; *Ex parte Sontag*, 64 Cal. 525.

The question before the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution. But it has been doubted whether, as they are sworn to "inquire," they may not, if the case of the prosecution appear imperfect, call for such wit

nesses as the evidence they have already heard indicates as necessary to make out the charge. Under such a suggestion, it would become the duty of the prosecuting officer to cause the requisite witnesses to be summoned; and it is his duty in any view to bring before the grand jury all competent witnesses to the *res gestæ*. But it is not the usage to introduce, in matters of confession and avoidance, witnesses for the defense, unless their testimony becomes incidentally necessary to the prosecution. Whart. Crim. Pl. & Pr. (8th ed.) § 360, citing 2 Hawk. P. C. chap. 25, § 145; 2 Hale, P. C. 257; 4 Bl. Com. 303; *United States v. Palmer*, 2 Cranch, C. C. 11; *United States v. Lawrence*, 4 Cranch, C. C. 518; 1 Chitty, Crim. Law, 318; Dickinson, Quarter Sessions, 174, 175; *Cox v. Coleridge*, 1 Barn. & C. 37, 51; *Reg. v. Borron*, 3 Barn. & A. 432; *Re Crowe*, 1 Chitty, 214; *Duty of Grand Jury*, Addison's Charges (Pa.) 42; *United States v. White*, 2 Wash. C. C. 29; *United States v. Blodgett*, 35 Ga. 336; *Respublica v. Shaffer*, 1 U. S. 1 Dall. 236, 1 L. ed. 115.

§ 186. Evidence of the Record on Appeal.

a. Rules in Admitting and Excluding Evidence.—Where a point upon which evidence is excluded is conceded by an admission made during the trial, or by an admission in the pleadings as well as where it is established by uncontradicted evidence, error in excluding additional evidence is generally said to be harmless, although it would, perhaps, be more accurate to say there is no error. Permitting the introduction of evidence that is clearly immaterial is, as a general rule, harmless even if erroneous. But this rule is one to be applied with some care, since it is not always possible for the appellate tribunal to ascertain what effect apparently immaterial evidence may have had upon a jury. It is, at all events, not safe to apply the rule strictly or too generally. Where it affirmatively appears or where it may be fairly inferred that in the particular case the erroneous admission of the evidence could not have influenced the verdict, the error is always to be regarded as harmless. As evidence seemingly immaterial may sometimes arouse prejudice, create undue passion, to carry the jury to collateral issues, it must be true that there are cases forming exceptions to the settled general rule. Where objection is made, but no evidence is introduced, the error in overruling the objection is rendered harmless for the reason that the ruling

was unimportant. It is held in one of our cases that "illegal proof of what need not be proved at all will not vitiate a verdict." But this doctrine requires some little qualification, for it is very clear that serious harm may be done by permitting a party to give incompetent evidence, although he may not be under any obligation to give any evidence upon the point. Elliott's Appellate Procedure, § 641, citing *Citizens State Bank v. Adams*, 91 Ind. 280; *Holliday v. Thomas*, 90 Ind. 398; *Cooper v. Blood*, 2 Wis. 62; *State v. Avery*, 17 Wis. 673; *Heath v. Keyes*, 35 Wis. 668; *Axtel v. Chase*, 83 Ind. 546; *Davis v. Liberty & C. Gravel Road Co.* 84 Ind. 36; *McKesson v. Sherman*, 51 Wis. 303; *Davis v. Fulton*, 32 Wis. 657; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275; *Dickinson v. Coulter*, 45 Ind. 445; *Indianapolis, P. & C. R. Co. v. Anthony*, 43 Ind. 183; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85; *Re Crawford*, 113 N. Y. 560; *Kinsley v. Morse*, 40 Kan. 577; *Oshkosh Gaslight Co. v. Germania F. Ins. Co.* 71 Wis. 454, 5 Am. St. Rep. 233; *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428; *Barton v. Kane*, 17 Wis. 38; *Winkley v. Foye*, 33 N. H. 171; *Edgerly v. Emerson*, 23 N. H. 555; *Shepherd v. Lanfear*, 5 La. 336; *Brooks v. Dutcher*, 22 Neb. 644; *Hanson v. Elton*, 38 Minn. 493; *Robinson v. Shanks*, 118 Ind. 125; *Klein v. Hoffheimer*, 132 U. S. 367, 33 L. ed. 373; *McDermitt v. Hubanks*, 25 Ind. 232; *Wayne County Turnp. Co. v. Berry*, 5 Ind. 286; *Naugle v. State*, 101 Ind. 284; *Gebhart v. Burkett*, 57 Ind. 378; *Lovinger v. Madison First Nat. Bank*, 81 Ind. 354; *Deig v. Morehead*, 110 Ind. 451; *Graves v. Campbell*, 74 Tex. 576; *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39; *Bartlett v. Beardmore*, 74 Wis. 485; *Fordyce v. McCants*, 55 Ark. 509; *Baker v. Dessauer*, 49 Ind. 28; *Findley v. State*, 5 Blackf. 576; *Beagles v. Sefton*, 7 Ind. 496; *Linard v. Crossland*, 10 Tex. 462; *Donley v. Camp*, 22 Ala. 659; *Sims v. Boynton*, 32 Ala. 353, 70 Am. Dec. 540.

An exception to the overruling of an objection to evidence, where the objection was made after the evidence has been received, is not available. *Pontius v. People*, 82 N. Y. 339.

b. Consideration of the Exceptions.—Exceptions in criminal causes occupy the same position that they do in civil actions, and where the record fails to furnish evidence of the nature and scope of the exceptions taken, it is too late to raise such exception in the appellate court on a motion for a new trial. So, objection to

the sufficiency of an indictment cannot be taken by objecting *ore tenus* to the introduction of evidence. *State v. Meyers*, 99 Mo. 107.

Other decisions in this court abundantly sustain this position. Rev. Stat. 1879, § 1921; *State v. Marshall*, 36 Mo. 400; *State v. Ray*, 53 Mo. 345; *State v. Williams*, 77 Mo. 310; *State v. Burnett*, 81 Mo. 119; *State v. McDonald*, 85 Mo. 539; *State v. Pints*, 64 Mo. 317.

Even in cases where the record discloses indisputable evidence of error on the part of the trial court a reversal of the judgment will not necessarily follow, as it is well settled, that a court is not required to reverse, even in a capital case for every error committed on the trial, even where such error is made the subject of an exception. *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *People v. Bransby*, 32 N. Y. 525; *People v. Gonzales*, 35 N. Y. 59; *Fralich v. People*, 65 Barb. 48.

The general exception to evidence that it is incompetent, irrelevant and immaterial, even when incorporated in the record is not sufficient to present a question for the appellate court. This rule obtains in civil causes, and the same as in civil actions. *Stringer v. Frost*, 2 L. R. A. 614, 116 Ind. 477; *Bundy v. Cunningham*, 107 Ind. 360; *Clark Civil Twp. v. Brookshire*, 114 Ind. 437; *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461; *Metzger v. Franklin Bank*, 119 Ind. 359; *Vickery v. McCormack*, 117 Ind. 594; *Byard v. Harkrider*, 108 Ind. 376; *McCullough v. Davis*, 108 Ind. 292; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409.

"A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants; and if he neglects in proper time to insist on his rights, he waives them." *McKinney v. People*, 17 Ill. 556.

To the same effect are *Bulliner v. People*, 95 Ill. 394; *Perteet v. People*, 70 Ill. 171; *Graham v. People*, 115 Ill. 566.

The general rule, which requires a party objecting to evidence to specify the ground of the objection, is to prevent surprise and enable the court and the other party, in dealing with the objec-

tion, to act understandingly. There are often technical objections to questions, which, upon being suggested, will at once be acquiesced in or induce a change in the form of the question or mode of proof by which the objection is obviated. In such cases common fairness and the due administration of justice requires that the party should, by specifying the ground of the objection bring the attention of the court directly to the point, and if he omits to do so he is justly deprived of the benefit of his objection. *People v. Beach*, 87 N. Y. 508.

Exceptions to the admission or exclusion of evidence in order to be available in the appellate court, must be specific; and should be framed in such a way as to call the attention of the presiding judge to the exact ground upon which the objection is based. *Fuller v. Smith*, 74 Ga. 835; *Smythe v. Scott*, 106 Ind. 245; *Burnswick v. Moore*, and *Hall v. Huff*, 74 Ga. 409; *Dozier v. Jerman*, 30 Mo. 216; *Letton v. Graves*, 26 Mo. 250; *Camden v. Doremus*, 44 U. S. 3 How. 515, 11 L. ed. 705; *Weston & P. R. Co. v. Cox*, 32 Mo. 456; *Peck v. Chouteau*, 91 Mo. 138; *Shelton v. Durham*, 76 Mo. 434; *Watson v. McLaren*, 19 Wend. 557; *Baier v. Berberich*, 85 Mo. 30; *Martin v. Travers*, 12 Cal. 243; *Baker v. Joseph*, 16 Cal. 173; *Mabbett v. White*, 12 N. Y. 442; *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620; *Jackson v. Cadwell*, 1 Cow. 622; *Michel v. Ware*, 3 Neb. 229; *Johnson v. Adleman*, 35 Ill. 265; *Carroll v. Benicia*, 40 Cal. 390; *Stone v. Great Western Oil Co.* 41 Ill. 85; *Moser v. Kreigh*, 49 Ill. 84; *Hanford v. Obrecht*, 49 Ill. 146; *Weide v. Davidson*, 15 Minn. 330; *Gilbert v. Thompson*, 14 Minn. 544; *Bickham v. Smith*, 62 Pa. 45; *Batdorff v. Farmers Nat. Bank*, 61 Pa. 179; *Moore v. Bank of the Metropolis*, 38 U. S. 13 Pet. 302, 10 L. ed. 172; *Elliott v. Peirsol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164; *Hinde v. Longworth*, 24 U. S. 11 Wheat. 199, 6 L. ed. 454; *Delphi v. Lowery*, 74 Ind. 520; *Forbing v. Weber*, 99 Ind. 588; *Carter v. Bennett*, 4 Fla. 284; *Elwood v. Deifendorf*, 5 Barb. 398; *Irvinson v. Van Riper*, 34 Ind. 148; *Feriter v. State*, 33 Ind. 283; *Sutherland v. Venard*, 32 Ind. 483; *Watts v. Green*, 30 Ind. 98; *Gibson v. Green*, 22 Ind. 422; *Evey v. Smith*, 18 Ind. 461; *Boggs v. State*, 8 Ind. 463; *Prather v. Rambo*, 1 Blackf. 189; *Priddy v. Dodd*, 4 Ind. 84; *Wolcott v. Yeager*, 11 Ind. 84; *Louisville, N. A. & C. R. Co. v. Grantham*, 104 Ind. 353; *Fuller v. Smith*, 74 Ga. 835; *Smythe v. Scott*, 106 Ind. 245; *Brunswick v. Moore* and *Hall v. Huff*, 74 Ga. 409;

Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212; *Landwerlen v. Wheeler*, 106 Ind. 523.

A particular objection is necessary to raise the question of the admissibility of evidence as part of the *res gestæ*. *Hughes v. State*, 27 Tex. App. 127.

The Illinois practice is in perfect harmony with the rules above stated, and it is well settled in that jurisdiction that all motions and decisions made before or rendered by the trial court, must be incorporated in the record through the medium of a bill of exceptions. *Holmes v. People*, 10 Ill. 478; *Earll v. People*, 73 Ill. 329; *McClurkin v. Ewing*, 42 Ill. 283; *Hay v. Hayes*, 56 Ill. 342; *Graham v. People*, 115 Ill. 566; *Snell v. Clinton M. E. Church Trustees*, 58 Ill. 292; *Tarble v. People*, 111 Ill. 120; *Gaddy v. McCleave*, 59 Ill. 183; *Boyle v. Levings*, 28 Ill. 314; *Thompson v. White*, 64 Ill. 314.

In order to entitle a party to a review of the action of the trial court, it is necessary that exceptions *be taken at the time of the adverse ruling*. This rule applies as well to criminal, as to civil cases. *State v. Elvins*, 101 Mo. 246; *State v. Brannum*, 95 Mo. 22; *State v. McDonald*, 85 Mo. 542.

See generally on this topic, 2 Rice, Civil Ev. chap. 34.

c. When Exceptions are Deemed Waived.—An exception may also be waived by the party taking it; he is not bound to stand by the exception. It may be waived expressly or by inference, and the implication of such waiver is unavoidable when he offers again proof of a fact excluded by a former ruling; for by his renewed application he elects to submit to the decision of the court. If that is in his favor, the former exception falls. He cannot retain the exception and so allege error in law, after getting such evidence as he offers, and try before the jury its effect upon the question of fact. He must be deemed to have made the new offer under circumstances satisfactory to himself, and is thus brought directly within the rule that exclusion of evidence at any stage of the trial is no ground of exception if it is subsequently admitted. *Park Bank v. Tilton*, 15 Abb. Pr. 384; *Morgan v. Reid*, 7 Abb. Pr. 215; *Jackson v. Parkhurst*, 4 Wend. 369; *Hay v. Douglas*, 8 Abb. Pr. N. S. 220; *Forrest v. Forrest*, 6 Duer, 102.

Under the provision of the New York Code of Criminal Procedure (§ 528, as amended by chap. 493, Laws of 1887), vesting in

the court of appeals jurisdiction to examine the record on appeal in a criminal action "where the judgment is of death," and to determine upon the whole case whether "the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," the defendant is not given and may not claim, as matter of right in this court, the benefit of errors occurring on the trial; the failure to make proper objections and take exceptions deprives them of that right; the court is simply vested with a power in its discretion to disregard the neglect and without regard to exceptions to review the case upon the merits. *People v. Driscoll*, 107 N. Y. 414.

The supreme court of Michigan say, in *Wellar v. People*, 30 Mich. 20, that "there is no rule recognized as authority which allows a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life or grievous mistake." The court further say that any doctrine which would hold every assailant as a murderer, where death follows his act, would be barbarous and unreasonable. Mr. Wharton in his work upon Criminal Evidence (§ 738), says the doctrine that malice and intent are presumptions of law, to be presumed from the mere act of the killing, belongs, even if correct, to purely speculative jurisprudence, and cannot be applied to any case that can possibly arise before the courts; that in no case can the prosecution limit its proof to the mere act of killing. *Kent v. People*, 8 Colo. 563.

PART II.

THE INSTRUMENTALITIES OF EVIDENCE.

CHAPTER XXVIII.

SECURING THE ATTENDANCE OF WITNESSES.

- §187. *Subpœna, the Term Defined by Bouvier.*
- 188. *Constitutional Guaranties to the Right to this Process.*
- 189. *Characteristics of the Writ.*
- 190. *United States Revised Statutes on the Subject.*
- 191. *Comments on the Writ.*
- 192. *Views of Mr. Justice Thornton.*
- 193. *Code Provisions on the Subject.*
 - a. *Tennessee.*
 - b. *Minnesota.*
 - c. *California.*
- 194. *Writ of Habeas Corpus may Issue when?*

§ 187. **Subpœna, the Term Defined by Bouvier.**—Subpœna is “A process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned. This is usually called a subpœna *ad testificandum*. On proof of service of a subpœna upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend as commanded.”

Subpœna *duces tecum* is a writ or process of the same kind as the subpœna *ad testificandum*, including a clause requiring the witness to bring with him and produce to the court, books, papers, etc., in his hands, tending to elucidate the matter in issue. 3 Bl. Com. 382; Bouvier, Law Dict. title *Subpœna*.

Briefly, it is “the process by which the attendance of a witness before a court or magistrate is required.” N. Y. Code Crim. Proc. 607.

It is the duty of the clerk of the court at which the indictment is to be tried to issue without charge as many subpoenas as may be necessary. New York Code Crim. Proc. 611. See also *Sherwin v. People*, 100 N. Y. 351.

§ 188. **Constitutional Guaranties to the Right to this Process.**—The constitution of the United States, and the constitutions, or statutes, of the several states, secure to the accused the right to compulsory process for obtaining witnesses in his behalf. An application may be made during the trial. This provision has been interpreted to mean that the accused shall not be debarred the right of issuing subpoenas for his witnesses, as in civil cases, and not to entitle him, on application, to a decree of the court for an allowance to secure their attendance. The court may direct an officer to serve such process for a pauper defendant. Abbott, Trial Brief, §§ 204–206.

The constitutional provision referred to reads as follows:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” Desty, Fed. Const. Amendments, art. 6.

§ 189. **Characteristics of the Writ.**—Where a witness cannot be trusted to voluntarily appear, he may be compelled to enter into a recognizance for his appearance, in default of which he may be committed until the time of his examination arrives. See *United States v. Butler*, 1 Cranch, C. C. 422; *Ex parte Shaw*, 61 Cal. 58; *Bickley v. Com.* 2 J. J. Marsh. 572; *State v. Grace*, 18 Minn. 398; *State v. Zellers*, 7 N. J. L. 265; *Means v. State*, 10 Tex. App. 16, 38 Am. Rep. 640. Where the witness is required to bring books or papers with him, a subpoena *duces tecum* should be served. See *Waring v. Warren*, 1 Johns. 340; *Ex parte Jaynes*, 70 Cal. 638. Under some circumstances a bench warrant will issue to enforce the attendance of a witness, who, having been duly subpoenaed, fails to appear when called to testify. See *People v. Marseiler*, 70 Cal. 98; Rapalje, Crim. Proc. § 289.

Disobedience to a subpoena, or a refusal to be sworn or to tes-

tify, may be punished by the court or magistrate as for a criminal contempt.

Until a witness not attending under a subpoena shall have been brought before the court or magistrate issuing such subpoena, he is liable only civilly, not criminally. *Reg. v. Rendle*, 11 Cox, C. C. 209; *Ex parte Langdon*, 25 Vt. 682; *State v. Matthews*, 37 N. H. 450; N. Y. Code Crim. Proc. § 619; N. Y. Code Civ. Proc. § 853; *Com. v. Newton*, 1 Grant, Cas. 454; *People v. Nevins*, 1 Hill, 158; *Mack v. People*, 82 N. Y. 236. No man can be proceeded against for a criminal contempt arising from his alleged disobedience of a subpoena until after he shall have been given the opportunity to explain to the court issuing the subpoena, his ambiguous act. *People v. Few*, 2 Johns. 290; *People v. Van Wyck*, 2 Cai. 334; *Reg. v. Russell*, 7 Dow. P. C. 693; 1 Gabbett, Crim. Law, 287; *Reg. v. Lefroy*, L. R. 8 Q. B. 134; 2 Bishop, Crim. Law, § 268; Whart. Crim. Pl. & Pr. [8th ed.] § 968; *State v. Nixon*, Wright (Ohio) 763; *McConnell v. State*, 46 Ind. 298; *Whitten v. State*, 36 Ind. 211-213; *Pitt v. Davison*, 37 N. Y. 239; *People v. Wilson*, 64 Ill. 205, 16 Am. Rep. 528; *Scholes v. Hilton*, 10 Mees. & W. 15.

§ 190. **United States Revised Statutes on the Subject.**—Witnesses who are required to attend any term of the circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney. U. S. Rev. Stat. § 877.

§ 191. **Comments on the Writ.**—Witnesses so subpoenaed may be required to enter into a recognizance conditioned upon their due appearance before the trial court; and upon their refusal, they may be committed and held in custody until the trial. See Greenl. Ev. § 313. It may well be doubted, whether this method of securing evidence, even in an important criminal case does not infringe both constitutional and common law rights, especially in that large class of cases where it does not appear that there is the least intention on the part of the witness to evade the responsibilities of the witness box.

The case of the *United States v. Lloyd*, 4 Blatchf. 427, furnishes instructive reading upon this subject. *Mr. Justice Betts* in com-

menting upon this pitiable condition of a witness, says: "This case illustrates some of the manifold hardships and inequities to which witnesses are liable, under the authority and administration of the laws which subject them, in criminal cases, to be imprisoned in close confinement at the discretion, in a good measure, of public prosecutors, to await a summons into court to testify on behalf of the United States. These laws afford no exemption for the aged, or the feeble, or those who, from infirmities of body or mind, are dependent on the attention and the services of others, or who must be separated, by such arrest or detention, from the most stringent calls of their own business, or from supplying help or solace to their families or friends, in the extremest exigencies of sickness or destitution."

There is a disposition on the part of the American judiciary to insist upon the actual confinement of witnesses only in cases where it appears that there is a design on his part not to attend the trial and give his evidence. The Minnesota supreme court so held in the case of *State v. Grace*, 18 Minn. 398, in which the *Chief Justice* says: "But though the witness may be required to recognize in the discretion of the court, the discretion (or judgment) here spoken of must, as in all other like cases, be intended to be a sound legal discretion. The judgment of the court cannot be capriciously exercised. It cannot legally abuse its discretion, nor, indeed, is it to be presumed that it will, if, for instance, it will be unjust or oppressive, and against common law and common right, as it certainly would be (*Evans v. Rees*, 12 Ad. & El. 55; 1 Greenl. Ev. 313; 1 Burn, Justice (24th ed.) 1013; 1 Archb. Crim. Pr. & Pl. 48) to commit such material witness in default of bail, without any proof that he had any intention of not appearing and testifying when duly subpoenaed, but who is too poor to render his recognizance of any value, or too friendless to be able to give bail."

The judicial "discretion" here spoken of has been further defined to be "the exercise of final judgment by the court in the decision of such questions of fact as, from their nature and the circumstances of the case, come peculiarly within the province of the presiding judge to determine." *Bundy v. Hyde*, 50 N. H. 116, 120. "Judicial discretion, in its technical, legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland*, 52 N. H. 401, 408. *Roscoe*, Crim. Ev. (7th ed.) 95; *State v. Lapage*, 57 N. H. 245.

"Where there is a witness residing in another district, the process of the court goes to that district. It is issued to the marshall of that district, and it is the duty of the person to whom it is addressed, if he has the means, to travel here to give his testimony. If he has not, the proper officer of the Government will furnish him with means. It is not necessary, if he has the means, that the fees should be tendered to him before he is required to obey the process. An attachment would issue and the court would punish a man who could pay his expenses and would not come because the money was not tendered. It is only where a man has not the means of paying his expenses, that it is necessary for the money to be tendered to the witness in order to make it incumbent on him to obey the process of the court.

" . . . Those witnesses who have not the means of attending court must be furnished with the means when the subpoena is served, and if there is doubt entertained of their being present at the trial they must be compelled to give security; if they fail to do so, they must be held in custody until the trial." *United States v. Durling*, 4 Biss. 509; *Ex parte Shaw*, 61 Cal. 58; *State v. Zellers*, 7 N. J. L. 220; *United States v. Butler*, 1 Cranch, C. C. 422; *Bickley v. Com.* 2 J. J. Marsh. 572; *State v. Walsh*, 3 N. J. L. J. 119; *Means v. State*, 10 Tex. App. 16, 38 Am. Rep. 640; *State v. Grace*, 18 Minn. 398.

§ 192. **Views of Mr. Justice Thornton.**—The serious position that an indictment compels the accused to occupy, forces upon our consideration a very grave question connected with the right of a person so circumstanced, to demand the production of certain evidence, or to compel the attendance of certain parties who are the custodians of information, and may operate in his favor. The student of constitutional law is doubtless familiar with that proviso, that we find embodied in the organic law of nearly every state, which guarantees to the humblest citizen, the right to have the process of the courts set in motion to compel the attendance of witnesses on his behalf. He has the same right to this process that he has to appear and defend in person and with counsel—both are the inseparable concomitants of American citizenship, immutable guarantees that survive all individual disaster and control the solemnities of judicial proceeding.

If it be objected that this statement is a truism within the knowledge of the most nascent intelligence I will only remark,

that it has been the subject of hot contention in the very recent case before the supreme court of California; and a majority of the court pronounce a rule utterly at variance with principles that have heretofore received as declaratory of a law that antedates the unification of our government. The case referred to is that of *Willard v. Santa Barbara County Sup. Ct.* 82 Cal. 456, and was decided in 1890. The dissenting opinion of *Judge Thornton* states the law in language that leaves no room for doubt as to the position occupied by one jurist in that state, on a very important subject. Few questions can more immediately concern that fraction in our community so unfortunate as to be under the accusation of crime, and the extent, nature and scope of their right to produce evidence to relieve the horrors of their position through the media of the court's process. And, while we are not prepared to countenance an indiscriminate excerpting from dissenting opinions by even such an eminent jurist as *Judge Thornton* has long been known to be, we are constrained to an exception in this instance. The opinion proceeds in the following language: "This process (of subpoena) cannot be denied to the defendant by any power of the state, legislative, executive or judicial. The constitution assures this right to a defendant accused of felony. It needs no statute to confer it. The constitution confers it, and it cannot be taken away by statute.

"The law by its very terms refers only to a witness for the people, not to a witness for the defendant. It grants the right to the defendant to have the deposition of his witness taken, when the witness is confined in the state prison or in the county jail of a county other than that in which the defendant is to be tried, in the manner provided for in the case of a witness who is sick, but he is not bound to have the testimony of the witness so taken. He can waive his constitutional right and have the deposition taken, should he so elect. But it is entirely at his option to have the witness compelled to attend, or to have his testimony taken by deposition. . . . Doubtless the accused would elect to have the deposition taken, if the witness was unable from illness to attend, rather than lose his testimony. The legislature cannot . . . restrict one on trial in a criminal action to having the testimony procured by deposition.

"The guaranty of the constitution . . . is for the benefit of the defendant in criminal actions. No such guaranty is given

to the people. . . . Convicted felons are now competent witnesses. But as at present advised, we are not prepared to hold that the legislature can . . . enact that a witness, material for the defense of a person accused and on trial for a felony, shall be declared incompetent to testify for the defense. Certain we are that no such legislation will ever be attempted while the constitution remains unchanged. It would be cruel to withhold such testimony from a person tried for an offense which may result in his deprivation of liberty.

"The guaranty that a defendant shall 'have the process of the court (*i. e.*, a subpoena) to compel the attendance of witnesses in his behalf,' as the guaranties of a speedy and public trial, and to appear and defend in person and with counsel, is assured in the same section of the constitution. Other guaranties are also expressed in the same section. A state legislature cannot deprive defendant of any of these rights. . . .

"It is to the interest of the people, as well as the defendant, that the witnesses of the latter should be made to give their testimony in the presence of the jury, for we all know, by daily experience, how much weight is added to or taken from the testimony by the personal appearance, bearing, and manner of the witness while under examination; if these add to the weight of his testimony, the defendant ought not to be deprived of such effect, except upon the grounds of necessity; and if they detract therefrom, such effect should be secured to the people in order that the ends of public justice may be subserved. Thus this rule requiring the personal attendance of witnesses, if the same can be had, is founded upon considerations of the wisest policy; and the various statutory provisions whereby the defendant is enabled to examine conditionally on commission a witness who is about to leave the state, or is sick or infirm, as to afford reasonable grounds for apprehending that he will be unable to attend the trial, were not designed to impair the rule or abridge the previous rights of the defendant, but, on the contrary, to enlarge those rights by enabling him to secure testimony of which he would otherwise be deprived, and at the same time preserve the rule in full force, so far as the same could be done in view of the right conferred by the statute.' *People v. Dodge*, 28 Cal. 448. See *People v. Francis*, 38 Cal. 183; *People v. Mitchell*, 64 Cal. 85.

"A defendant has the constitutional right to have the witnesses

against him examined in open court and in his presence. By the guaranty of due process of law he has a right to be confronted with the witnesses for the prosecution. The correlative right is given him to have the witnesses in his behalf testify in open court.

"One further proposition should be stated. . . . The state owes equal and exact justice to those under its authority in all proceedings against them. It can have no higher justifiable right as to witnesses than the defendant. Nor should nor does it ask any higher right in this regard. If anything, it should be content with an inferior right. It holds the lists and appoints the president thereof, in which the contest between the people and the defendant on trial is waged. And the defendant might truly say that equal justice has not been done, when the state can compel the attendance of a witness to prove his guilt, and the defendant cannot compel the attendance of a witness in like circumstances to establish his innocence. Justice, as Lord Coke says, should be free, full, and speedy; free, because nothing is more unjust than justice which has to be bought; full, because justice ought not to halt or be maimed; and speedy, because delay is to some extent a denial of justice. See Coke, Inst.pt. 2, p. 55.

"It should be recollected that a witness brought from the state prison might clearly show the defendant's freedom from guilt. The difference between the living speaking witness before a jury, and the inanimate lines of a deposition, is recognized by all familiar with courts of justice. As is well said in an old act of Parliament of 9 Edward II., styled *Articuli Cleri*, in referring to a trial by jury: 'We hold, and shall be able to approve it to be a far better course for matter of fact upon the testimony of witnesses, sworn *viva voce*, than upon the conscience of any one particular man, being guided by paper proofs.' See Coke, Inst. pt. 2, p. 611.

"Especially would this be the case with a convict in prison brought from a state prison. He comes with the stain of conviction on his credit. But his appearance and manner, under the ordeal in open court of examination and cross-examination, might assuredly show to court and jury that he is a perfectly reliable witness, and establish beyond question the innocence of the person on trial. Should a defendant then be deprived of this right?"

§ 193. Code Provisions on the Subject.

a. **Tennessee.**—Statutory provisions of the Tennessee Code as contained in §§ 6225–6232, inclusive, are typical of the modern law relative to this subject. The sections referred to provide as follows: “The magistrate before whom an information is made, may issue subpoenas to any part of the state for witnesses, on behalf either of the defendant or the state. The clerk of the court in which a criminal cause is pending, shall issue subpoenas, at any time, to any part of the state, for such witnesses as either the district attorney or the defendant may require. He shall also issue a subpoena, without any application, for witnesses, whose names are marked as such by the district attorney upon the indictment. The clerk of the court should make the subpoena returnable on the day fixed by the law, or by the court, for taking up the criminal business of the term, or the particular case. The subpoena is served in the same way and by the same officers as the subpoena in civil cases. If the witness conceal himself to avoid the service of a subpoena, the officer may make service by leaving a copy posted on the door or other conspicuous place. Proceedings may be had against defaulting witnesses in criminal cases, as prescribed in civil cases. The undertaking of recognizance of witnesses is forfeited and enforced like the undertaking and recognizance of bail.”

b. **Minnesota.**—Where the prisoner is admitted to bail, or committed by the magistrate, he shall also bind by recognizance such witnesses against the prisoner as he deems material, to appear and testify at the next court having cognizance of the offense, and in which the prisoner is held to answer.

If the magistrate is satisfied that there is a good cause to believe that any such witness will not perform the condition of his recognizance unless other security is given, such magistrate may order the witness to enter into a recognizance, with such sureties as may be deemed necessary, for his appearance at court.

When any married woman or minor is a material witness, any other person may be allowed to recognize for the appearance of such witness; or the magistrate may, in his discretion, take the recognizance of such married woman or minor in a sum not exceeding fifty dollars.

All witnesses required to recognize, either with or without sureties, shall, if they refuse, be committed to prison by the magistrate

there to remain until they comply with such order, or are otherwise discharged according to law.

It shall not be lawful, except in cases of murder in the first degree, arson, where human life is destroyed, and cruel abuse to children, to commit or imprison any witness who is willing and offers to enter into his or her own recognizance, without sureties, to appear and testify in the case or prosecution in which his or her testimony is required. All persons held as witnesses shall receive such compensation during confinement as the judge of the court in which the case is pending shall direct, not exceeding regular witness fees. 1872, chap. 77, § 1; Minn. Stat. chap. 106, §§ 19-23.

c. California.—The process by which the attendance of a witness before a court or magistrate is required is a subpoena: It may be signed and issued by—

1. A magistrate before whom a complaint is laid, for witnesses in the state, either on behalf of the people or of the defendant.

2. The district attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

3. The district attorney, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried.

4. The clerk of the court in which an indictment or information is to be tried; and he must, at any time, upon an application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him as clerk, for witnesses in the state, as the defendant may require.

A subpoena may be served by any person, but a peace officer must serve in his county any subpoena delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by showing the original to the witness personally, and informing him of its contents.

When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpoena or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the

attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness.

No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides, or is served with the subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a judge of a superior court, upon an affidavit of the district attorney or prosecutor, or of the defendant, or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness.

Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the court or magistrate as a contempt.

When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail.

When the testimony of a material witness for the people is required in a criminal action, before a court of record of this state, and such witness is a prisoner in the state prison or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by the judge thereof; but in case the prison or jail is out of the county in which the application is made, such order shall only be made upon the affidavit of the district attorney, or other person, on behalf of the people, showing that the testimony is material and necessary; and even then the granting of the order shall be in the discretion of the court or judge. The order shall be executed by the sheriff of the county in which it shall be made, whose duty it shall be to bring the prisoner before the proper court, to safely keep him, and when he is no longer required as a witness, to return him to the prison or jail whence he was taken; the expense of executing such order shall be paid by the county in which the order shall be made. Desty, Cal. Penal Code, §§ 1326-1333.

§ 194. **Writ of Habeas Corpus may Issue when.**—The attend-

ance of a witness in prison may be secured by a *habeas corpus ad testificandum*. See *Rex v. Roddam*, Cowp. 672; *State v. Kennedy*, 20 Iowa, 569. To this writ it is ordinarily a prerequisite that the party desiring the attendance of a witness should make affidavit before a judge at chambers that the witness in question is material to the case, but is in custody, whether on criminal or civil process. Chitty, Forms, 60; *Marsden v. Overbury*, 18 C. B. 34; *Gordon's Case*, 2 Maule & S. 582; *Browne v. Gisborne*, 2 Dowl. N. S. 963; *Graham v. Glover*, 5 El. & Bl. 591. A party to the record, who is entitled to testify in the case, if he be in prison, is entitled to use this writ in order that he himself may be brought into court. *Ex parte Cobbett*, 4 Jur. N. S. 145. The same writ has been issued to secure the presence in court of a person confined as a lunatic. *Fennell v. Tait*, 1 Cromp. M. & R. 584; Whart. Crim. Ev. (9th ed.) § 351. See also *Maxwell v. Rives*, 11 Nev. 213.

CHAPTER XXIX.

COMPETENCY AND CREDIBILITY OF WITNESSES.

- § 195. *The Term Defined.*
196. *Competency Generally Presumed.*
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198. *New York and California Rules Relating to the Subject.*
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201. *Credibility of Witnesses is for the Jury.*
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§ 195. **The Term Defined.**—A witness is one who, being sworn or affirmed, according to law, deposes as to his knowledge of facts in issue between the parties in a cause. Bouvier, Law Dict. title *Witness*.

§ 196. **Competency Generally Presumed.**—All persons are competent to testify in all cases except as hereinafter excepted. Stephen, Dig. art. 106.

The principle above stated as to the general competency of all persons, for the witness stand has obtained wide acknowledgment and found expression in statutory enactments in all the American states. Of the thirty-one states now under the code system, the rule as formulated by the codes of California and New York, may be taken as a type of the present law which finds expression in the first named code in the following language: "All persons without exception, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses." Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in ques-

tion, as provided in Cal. Code Civ. Proc. 1879, § 1847; N. Y. Penal Code, § 714.

In *People v. McGuire*, 45 Cal. 57, the broad principle was affirmed by an undivided court, "that no witness can be excluded in any case on account of nationality or color," and one who has been convicted of felony may testify. *People v. McLane*, 60 Cal. 412. And the presumption is that all witnesses are both competent and credible, but, if the contrary should be claimed it is exclusively the province of the court to determine the validity of the objection. *State v. Lattin*, 29 Conn. 389; *Peterson v. State*, 47 Ga. 524; *State v. Scanlan*, 58 Mo. 204; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272; *Com. v. Burke*, 16 Gray, 33; *State v. Levy*, 5 La. Ann. 64; *Brown v. State*, 24 Ark. 620; *State v. Holloway*, 8 Blackf. 45.

Under these liberal enactments the judge may be a witness. And it is said that he may be so, even although he is the judge to try the cause. A juror, however, may be a witness, either for or against the prisoner and must be sworn as such, but it is right that he should inform the court of his having evidence to give in the case, before he is sworn as juror, and, indeed, to decline acting as a juror in the case, if the court will permit him. Archb. Crim. Pr. & Pl. p. 150.

A marginal note to the above paragraph in Pomeroy's edition of the well known work above cited, says: "A juror may give evidence of any fact material to be communicated in the cause of a trial. In a criminal prosecution, the jury may use that general knowledge which any man may bring to the subject-matter of the indictment, without being sworn. But, if any one of the jurors has a particular knowledge on the subject—as for instance, as to the value of a watch in a case where it is essential to prove what it is worth—he ought to be sworn and examined as a witness. *Rex v. Rosser*, 7 Car. & P. 648; *McKain v. Love*, 2 Hill, L. 506, 27 Am. Dec. 401.

"A juror may be admitted to prove improper attempts by a party to influence the minds of a jury. *Denn v. Driver*, 1 N. J. L. 166. So, also, to show the misconduct of his fellow jurors, in order to impeach their verdict. *State v. Freeman*, 5 Conn. 348."

A delicate question arises, where, in the furtherance of justice it becomes necessary for the defendant to produce, as a witness, the presiding judge. Such cases are rare, but by no means im-

possible. A decision of the New York supreme court in 1854 is instructive. In the course of the trial, the defendant offered as a witness in his behalf the Hon. Harvey Humphrey, county judge of Monroe county. It was objected on the part of the prosecution that *Judge Humphrey*, being a member of the court, could not be sworn as a witness. The objection was sustained, and the defendant excepted. *Judge Welles* in writing the opinion of the court, says: "We think this decision was correct. The court could not be held without the county judge, and it would have broken up the court for the time being for him to take his stand as a witness. He could not act in the double capacity at one and the same time of judge and witness. To make this apparent, it is only necessary to suppose a claim of privilege by the witness in regard to answering a question put to him, or his refusal to answer a question which his associates of the court decide he is bound to answer, with a motion for his commitment, as being in contempt, until he should answer, or of evidence introduced to contradict or impeach him. Such things are possible in the nature of the case." *People v. Miller*, 2 Park. Crim. Rep. 197.

"The prosecuting attorney is not bound by any oath of secrecy; and certainly we know of no sufficient reason why he may not be called upon, in a court of justice, to disclose any evidence given, or proceedings had, before the grand jury, of which he may have personal cognizance. It is said that it is contrary to public policy to allow the defendant in a criminal case to call upon the prosecuting attorney as a witness in a court of justice, to disclose any evidence given, or proceedings had, before the grand jury. We fail to see the matter in that light. In our opinion, public policy does not require that any citizen should be convicted of a public offense by means of doubtful evidence. Where the principal witness for the state has made statements under oath before the grand jury in regard to the transaction upon which the criminal charge is predicated, which statements cannot be reconciled with the evidence of the witness on the trial, and this is personally known to the prosecuting attorney, it seems to us that neither his official duty nor public policy would require that he should withhold his evidence of the fact when called upon by the defendant to testify as to the fact, and seek a conviction of the defendant upon evidence which, from the facts within his personal knowledge, he had reason to believe was at least doubtful." *Burdick v. Hunt*, 43 Ind. 381.

§ 197. **General Abrogation of Former Disqualifying Laws.**—Express legislation in many states has wholly abrogated former rules of disqualification by reason of crime, and a party may now show the record of conviction not because it renders the witness incompetent but merely for the purpose of impairing the credibility. For authorities sustaining this proposition, see general statutes of all the states.

§ 198. **New York and California Rules Relating to the Subject.**—"A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness, in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question." N. Y. Penal Code, § 714.

"This section abolishes a relic of the old rules disqualifying witnesses, which is contrary to the spirit of modern legislation upon the subject in this state, and has been abolished in England for fully a third of a century. The settled theory in regard to the competency of the witnesses now is, that the court or jury shall have all possible light thrown upon the facts, and judge for itself what credence to give to the evidence offered. The exclusion of felons as witnesses has been justified by the argument (1) that their testimony is unreliable and unsafe, and (2) that it is a proper punishment for their crimes. Upon neither theory can it be justified." Per Throop, N. Y. Code Commissioner.

"The following persons cannot be witnesses:

"1. Those who are of unsound mind at the time of their production for examination.

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

"3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Amendment, approved April 16, 1880; Cal. Code Civ. Proc. § 1880.

The California Code of Civil Procedure embodies the best feat-

ures of modern legislation on this topic of competency. Section 1879 of that act crystalizes the juridical sentiment upon the subject, and it may be quoted as typical of the law as at present understood by the judiciary of the United States.

The following is the context of the section referred to:

"All persons, with exception, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in Cal. Code Civ. Proc. 1879, § 1847."

§ 199. **Theory of Chief Justice Appleton.**—The Hon. John Appleton, for many years chief justice of the state of Maine, in the preface to his valuable work on "The Rules of Evidence," states the result of his research and experience to be: "1. All persons without exception, who having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses. 2. That objections may be made to the credit but never to the competency of witnesses. 3. That while the best evidence should always be required, the best existing evidence should not be excluded because it is not the best evidence of which the case in its nature is susceptible." The learned author goes on to say that many of the reforms pointed out in his essay have been partially adopted. Interest and infamy, in very many states, have ceased to be ground for the exclusion of testimony. A limited admission of the testimony of the husband and wife has been allowed in cases where one or the other is a party. The parties in civil cases, with greater or less restrictions upon their testimony, have been received or compelled to testify in their own cases. In offenses of the lowest grade of criminality the accused in one state (and since then in others) has been admitted as a witness in his own behalf. But incompetency from defect or from a want of religious belief, is still the law in most of the states. The law as to confessions and hearsay continues in a chaotic condition. Different courts and the same court on different occasions, employ differing modes of extracting proofs. So far as changes have been made,

their practical working in the administration of the law has been such as to make it a matter of astonishment how courts could have ever hoped to administer justice, when the evidence now received was excluded.

As to whether a record of conviction of a witness for a felony, where it does not disqualify, is evidence in a civil action for the purpose of impeachment, *quære*.

In the case of *People v. Noyes*, tried at the Livingston circuit in November, 1876, it was held, that a person convicted of felony in the state of Michigan, was not thereby rendered incompetent to testify, but that the fact of the conviction went only to his credibility. To the same effect is the case of the *Com. v. Green*, 17 Mass. 515, where the question received great consideration, and an able opinion was written by Parker, *Ch. J.*, which was concurred in by the whole court.

It was decided in the case of *Carpenter v. Nixon*, 5 Hill, 260, that the record of the conviction of a witness of petit larceny, was admissible for the purpose of affecting the credit of such witness, and that the refusal to receive it for that purpose was error.

In *Newcomb v. Griswold*, 24 N. Y. 298, the competency of such evidence for that purpose is admitted, but it is held that the fact of the conviction cannot be proved by parol, even by the witness himself upon cross-examination, but must be established by the general rule laid down in all the elementary works upon evidence, that particular facts cannot be proved to effect the credit of a witness, but that the examination must be confined to his general reputation.

The entire discussion is of trifling importance in view of the very general abrogation of the old exclusionary rules which denied to convicts the privilege of a witness. This disqualification has been removed in all of the New England states, in California, Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Vermont, Virginia, Washington and Wisconsin. A lingering survival of the rule is found in some of the southern states, notably, Florida, Mississippi and South Carolina.

§ 200. Exceptions to the General Rule.

a. **Husband and Wife.**—There are particular relations in which it is the policy of the law to encourage confidence, and to preserve

it inviolate; therefore a person cannot be examined as a witness in the following cases:—

A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. But the exception does not apply to a civil action, suit, or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment;

A priest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline, enjoined by the church to which he belongs;

A public officer shall not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure. *Lucas v. State*, 23 Conn. 18; *William v. State*, 53 Ga. (Supp.) 85; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440; *Downing v. Rugar*, 21 Wend. 178, 34 Am. Dec. 223; *Wilke v. People*, 53 N. Y. 525; *People v. Briggs*, 60 How. Pr. 17; *People v. Moore*, 65 How. Pr. 177; *People v. Crandon*, 17 Hun, 490; *Taulman v. State*, 37 Ind. 353; *Hubbell v. Grant*, 39 Mich. 641; *State v. Houston*, 50 Iowa, 512; Iowa Code, § 3641; *Dill v. State*, 1 Tex. App. 278; *State v. Douglass*, 20 W. Va. 770. As to when he can testify for his client, see *Chappell v. Smith*, 17 Ga. 68; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. 416, 421; *Landsberger v. Gorham*, 5 Cal. 450; *Gower v. Emery*, 18 Me. 82; *Satterlee v. Bliss*, 36 Cal. 507; *Toomes Estate*, 54 Cal. 509; 3 Rev. Stat. (6th ed.) 671, § 119; Code Civ. Proc. §§ 834, 836; *Edington v. Mutual L. Ins. Co.* 67 N. Y. 185; *Cahen v. Continental L. Ins. Co.* 69 N. Y. 308; *Grattan v. National L. Ins. Co.* 15 Hun, 77; *Hildreth v. Shepard*, 65 Barb. 265; *Wolstenholme v. Wolstenholme File Mfg. Co.* 3 Lans. 467.

It is admitted in all the cases that the wife is not competent, except in prosecution for an offense against her, directly to crimi-

nate her husband or to disclose that which she has heard from him in their confidential intercourse. The rule which protects an attorney in such a case, is founded upon public policy, and may be essential to the administration of justice. But this privilege is the privilege of the client and not of the attorney. The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded, but it renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories.

As authority for the foregoing text and as illustrating the principle there stated we append the statutory law of several states with some pertinent judicial comment.

The Iowa Code provides as follows:

"§ 3641. The husband nor wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding one against the other, but they may in all civil or criminal cases, be witnesses for each other."

Commenting upon this statute in *State v. Houston*, 50 Iowa, 512, the court said: "Amelia M. Houston, wife of the defendant, was examined and testified before the grand jury. It is insisted by the defendant that that fact rendered the indictment void, and that the verdict cannot be allowed to stand. The wife cannot be a witness against her husband except in a criminal prosecution for a crime committed against her, and in a civil action brought by one against the other, but she may be a witness for him in all cases. Iowa Code, § 3641. When the grand jury have reason to believe that evidence within its reach will explain away the charge, it may order such evidence to be provided. Iowa Code, § 4276.

"A witness, then, called before the grand jury is not necessarily called against the defendant. It might be the defendant's privilege that his wife should be called.

"If, however, where a defendant's wife is called, and the facts of which she has knowledge are unfavorable to the husband, it would be proper for her to object to testifying, and we think she could not be compelled to testify against her objection. If she testified, and her testimony was unfavorable to her husband, so that it appeared that the indictment was found, in whole, or in part, upon her testimony, possibly the indictment might be quashed upon that ground. But the defendant should judge whether her testimony was favorable or unfavorable before proceeding to trial, and moved to quash if he thought there was ground for it. We think it too late to raise an objection of this kind after conviction."

The Texas Code provides that "the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense by one against the other." Tex. Code Crim. Proc. art. 735. In construing this statute with reference to the extent to which the right of cross-examination may be carried by the state where one spouse has been called to testify for the other, it is said that "whilst it is true the spouse is subject to cross-examination like any other witness it is also true that such cross-examination must be confined strictly to the matters about which she has testified on the examination in chief." *Washington v. State*, 17 Tex. App. 197, citing *Creamer v. State*, 34 Tex. 174, and *Greenwood v. State*, 35 Tex. 587; *Johnson v. State*, 28 Tex. App. 17.

In Illinois the statute directs that no husband or wife shall be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support; and, except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce, and except also in actions upon policies of insurance or property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount

and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife." Ill. Rev. Stat. 489, § 5.

In Oregon the element of mutual consent appears: "In all criminal actions, where the husband is the party accused, the wife shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them, provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other." Hill, Ann. Law of Oregon, § 1366.

The phrasing of the New York statute is peculiar: "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage." N. Y. Penal Code, § 715. In exposition of this provision is the case of *People v. Hovey*, 29 Hun, 382, a homicide of peculiar atrocity, and which was defended by one of the most eminent lawyers known to the criminal bar. The general term of the supreme court said: "It is urged on behalf of the appellant that the presumption must be that his wife was hostile to him, and that he was not, therefore, obliged to use her as a witness or to be subjected to any criticism because he did not call her. This view is fallacious. The presumption is that she would tell the truth, and the appellant must take the consequences of such presumption."

As late as 1884, the New York supreme court says: "The examination of the wife of the defendant as a witness against her husband was not error. She was not compelled to disclose any confidential communication passing between herself and her husband during their marriage, and within that limitation she was a

competent witness." N. Y. Penal Code, § 715. The case of *People v. Hovey*, 29 Hun, 382, 1 N. Y. Crim. Rep. 180, arose before the penal code took effect. *People v. Petmecky*, 2 N. Y. Crim. Rep. 450.

The question as to how far the testimony of a husband, which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, is not satisfactorily settled by precedent. In the case of *Rex v. Cliviger*, 2 T. R. 263, it was thought that such testimony was inadmissible from reasons of public policy, to avoid dissensions between husband and wife. This was a case of settlement, where a marriage in fact had been proved, and, the husband having given testimony denying a previous marriage, it was held that the first wife could not be called to prove the same, as it would tend to criminate him in respect of two crimes,—bigamy and perjury. But in two cases subsequently decided, where the question was the same, except that the husband had not given testimony denying his previous marriage, it was held that the first wife was a competent witness to prove such marriage. *Rex v. All Saints*, 6 Maule & S. 194; *Rex v. Bathwick*, 2 Barn. & Ad. 639. In these two cases the rule declared in *Rex v. Cliviger* may be regarded as having been qualified, at least, so far as to recognize the competency of husband and wife as witnesses in collateral cases, where the testimony of the one of them who is called as a witness can criminate the other only when connected with other evidence.

In the case of *State v. Dudley*, 7 Wis. 664, on the trial of an indictment for adultery committed by the defendant with the wife of a man who had subsequently procured a divorce, it was held that the divorced husband was a competent witness to prove his marriage with his divorced wife. In *State v. Marvin*, 35 N. H. 22, on a similar indictment, the husband testified without objection to the marriage and to the fact of the adultery; but, being asked if he lived with his wife at the time of the trial, answered that he did not. To this last statement the defendant objected, but the objection was overruled, and it was held, on a motion to set aside the verdict, to have been properly admitted.

We find no American decision, with the exception of the two above stated (if they can be deemed an exception) which sanctions the unqualified admissibility of such testimony in a collateral proceeding. It has been held in four different states, that, on the

trial of an indictment against a man for adultery, the husband of the woman with whom the crime is alleged to have been committed, is not a competent witness to prove the fact. *State v. Gardner*, 1 Root, 485; *State v. Welch*, 26 Me. 30, 45 Am. Dec. 94; *State v. Wilson*, 31 N. J. L. 77; *Com. v. Sparks*, 7 Allen, 534. In the last named case *Merrick, J.*, in delivering the opinion of the court said: "It has never been determined that a husband or wife is admissible as a witness in any collateral proceeding, to testify directly to the commission of any criminal act of the other. Nor ought such testimony to be received in any proceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against the other is founded."

Let it be remembered that it is only where there has been a valid marriage that the parties are excluded from giving evidence for or against each other by the common law. *Roscoe*, *Crim. Ev.* 124; 1 *Greenl. Ev.* § 339; *Whart. Crim. Ev.* § 390. It has therefore been held in indictments for bigamy, after proof of the first marriage, that the second woman married is a competent witness against her husband, for the second marriage is void and she is no wife. To test this competency the woman may be examined on the *voir dire* as to this void marriage. *Whart. Crim. Ev.* §§ 395-397; 1 *East*, P. C. 469; *Seeley v. Engell*, 13 N. Y. 542; *State v. Gordon*, 46 N. J. L. 432.

b. Exception Arising from Lunacy and Intoxication.—In *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618, *Mr. Justice Field* formulates the rule on this branch of our subject as follows:

"It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency from any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evi-

dence a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard.

"The general rule therefore is, that a lunatic or person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the Court of Criminal Appeal in England, in the case of *Reg. v. Hill*, 5 Cox, C. C. 259. There the prisoner had been convicted of manslaughter; and on the trial the witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so, and that it was solely with reference to the delusion about the spirits that he considered him a lunatic."

Peake lays down this proposition, which cannot fail to command general assent: "All persons who are examined as witnesses must be fully possessed of their understanding; that is, such an understanding as enables them to retain in memory the events of which they have been witnesses and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, while under the influence of their malady, not possessing this share of understanding, are excluded." p. 152. This principle necessarily excludes persons from testifying who are besotted with intoxication at the time they are offered as witnesses; for it is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events, of which they may have had a knowledge, as to be able to present them fairly and faithfully, to those who are to decide upon contested facts. A present and existing intoxication, to a considerable degree, utterly disqualifies the person so affected to narrate facts and events in a way at all

to be relied on. It would, we think, be profaning the sanctity of an oath to tender it to a man who had no present sense of the obligations it imposed. *Hartford v. Palmer*, 16 Johns. 143.

In a late case in Washington territory, it is held that the exclusion of an intoxicated witness from the court room and the refusal of the court to permit him to testify, is not error; but it might constitute ground for a new trial if the party who offered the witness informed the court of the importance of his testimony, and asked an adjournment of the trial until he became competent to testify, and the court refused the request. *Fox v. Territory*, 2 Wash. Ter. 297, 5 West Coast Rep. 339. See also *Hartford v. Palmer*, 16 Johns. 143; *Gould v. Crawford*, 2 Pa. 89; *Cannady v. Lynch*, 27 Minn. 435.

Where the degree of idiocy or lunacy is such as to impair the understanding, cloud the memory, thicken the speech and benumb the faculties, it works disqualification of the witness, and under every rule of propriety the person so situated should be excluded from the stand. Wherever their condition is such that they do not comprehend the nature of an oath, they should be rejected. *Livingston v. Kiersted*, 10 Johns. 362; *Coleman v. Com.* 25 Gratt. 365.

An insane person may be competent to testify to facts not relating to himself according as the court is satisfied with the degree of his understanding; and a person who has been insane, and is apparently recovered may testify to facts occurring during the period of this insanity, provided, that in both mentioned cases the facts testified to are objectively demonstrable, and constitute a basis from which to begin such testimony. A personal and self-regarding incident occurring during a period of insanity, and testified to by its subject either while still insane or when recovered from that state, is not *per se* an evidential fact, and its probative force rests wholly upon corroborating circumstances.

These conclusions are derived from principles in the law of evidence, which have become fixed by time and experience. See *Sarbach v. Jones*, 20 Kan. 497; *Campbell v. State*, 23 Ala. 44; *Cannady v. Lynch*, 27 Minn. 435.

The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly, as upon his disposition to describe them honestly; and if the mind of the witness is in such a condition that it cannot accurately observe pass-

ing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer. *People v. New York Hospital*, 3 Abb. N. C. 229. See *Lewis v. Eagle Ins. Co.* 10 Gray, 508; *Coleman v. Com.* 25 Gratt. 865; *Rivara v. Ghio*, 3 E. D. Smith, 264; *Bell v. Rinner*, 16 Ohio St. 45; *Holcomb v. Holcomb*. 28 Conn. 177.

c. Exception as to Deaf Mutes.—One of the crowning glories of an advanced civilization and one of the grandest achievements of educational methods has been the emancipation of deaf mutes from the horrible thralldom imposed by that forlorn and pitiful condition. The brutal dictum of Lord Hale, that persons so situated are to be deemed the same as idiots, has passed, like countless other provisions of the common law, into well merited oblivion. A doctrine so repugnant to every sentiment of benevolence, and so utterly at variance with common observation, has very properly been utterly rejected by our courts, and upon sufficient understanding being shown, a deaf mute may be sworn and give his testimony through an interpreter. Such a witness is competent in Indiana, if he has sufficient discretion and understands that perjury is punishable by law, though he has no conception of the moral obligation of an oath.

If he can write sufficiently well to communicate ideas perfectly in that way, he will be required to give his testimony in writing (*Morrison v. Lennard*, 3 Car. & P. 127) but he may resort to signs, though it appears that he can read and write and communicate ideas imperfectly, by writing. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Com. v. Hill*, 14 Mass. 207; *People v. McGee*, 1 Denio, 19; *Reg. v. Guttridges*, 9 Car. & P. 471; *Reg. v. Megson*, 9 Car. & P. 418.

d. Exception as to Infancy.—There is no precise age at which children are competent or incompetent. The question of competency is not to be determined by any precise age, but by apparent capacity. *Brown v. State*, 2 Tex. App. 115; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100; *Draper v. Draper*, 68 Ill. 17; *Flanagan v. State*, 25 Ark. 92. Children of seven, eight and nine years of age are frequently sworn, and there is so wide a difference in the capacity of children that many of them are more intelligent at nine years of age than others are at ten or twelve. Children of fourteen are presumed to be competent, and

those who are younger than that will be sworn if they are really competent. Investigation, however, may disclose a sufficient understanding. *Davidson v. State*, 39 Tex. 129. And where a child eight years of age testified that she did not know what the Bible was, but believed that she must tell the truth on the stand, or be punished hereafter, she was permitted to testify. *Com. v. Carey*, 2 Brewst. 404, and see *Vincent v. State*, 3 Heisk. 120; *Logston v. State*, 3 Heisk. 414.

When a child is intelligent, the court will permit him to be sworn as a witness, leaving the value of his evidence to the jury. When a child under fourteen years of age is offered as a witness, the justice should examine him, so as to ascertain if he is competent, provided such a request is made by the opposite party. *People v. McNair*, 21 Wend. 608. If the child is naturally intelligent, but does not fully understand the nature of an oath, the justice may instruct him, by informing him of the moral obligations and of the legal consequences of false swearing. This may be done at the trial before swearing the witness. N. Y. Code Civ. Proc. § 850.

If the court examines a child to test its competency as a witness and finds it incompetent, it must be a flagrant case of error to authorize an appellate court to reverse the judgment. *Peterson v. State*, 47 Ga. 524.

When a witness is objected to, on the ground that he or she is incompetent by reason of nonage or want of intelligence, it is the province of the trial court to determine the witnesses's competency, and its decision cannot be reviewed unless there be a clear abuse of discretion, or the court admits or rejects the witness upon an erroneous view of a legal principle. *Com. v. Mullins*, 2 Allen, 295; *Com. v. Hills*, 10 Cush. 530; *State v. Levy*, 23 Minn. 104.

The above rule has taken statutory form in the state of New York and reads as follows:

"Whenever in any criminal proceedings a child actually or apparently under the age of twelve years offered as a witness does not, in the opinion of the court or magistrate, understand the nature of an oath, evidence of such a child may be received though not given under oath if, in the opinion of the court or magistrate such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offense upon such testimony unsupported by other evidence." 1 N. Y. Laws, 1892, chap. 279, § 392.

The admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. It is a question addressed to the good sense and discretion of the judge whether the child is competent or not; but neither the testimony of the child without oath, nor evidence of any statement which he has made to any other person, is admissible. This is now the established rule in all cases, criminal and civil. In practice, it is not unusual to receive the testimony of children of eight or nine years of age. "It certainly is not law," said Baron Alderson, "that a child under seven cannot be examined as a witness." Heard, *Crim. Law*, § 19, citing *Marsh v. Loader*, 14 C. B. N. S. 535; Powell, *Ev.* (4th ed.) 29; 1 Stark. *Ev.* 117; 2 Taylor, *Ev.* § 1242; *Com. v. Hutchinson*, 10 Mass. 225; *Reg. v. Nicholas*, 2 Car. & K. 246; *Reg. v. Holmes*, 2 Fost. & F. 788; *Reg. v. Oulaghan*, Jebb, C. C. 270; *Reg. v. Perkins*, 2 Moody, C. C. 139.

When a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness's oath, and in proper cases, to explain the same to one intelligent enough to comprehend what he says; and then to determine whether or not such child shall be sworn and permitted to testify. *Carter v. State*, 63 Ala. 52.

e. Summary of the Foregoing Exceptions.—In digest form the exceptions to the general rule of competency may be tabulated as follows:—

(1) One who is of unsound mind at the time of his production for examination, unless upon examination the court is satisfied that he has sufficient understanding to comprehend the obligation of an oath and to be capable of giving a correct account of the matters as to which he is to be examined as a witness.

(2) Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

(3) A public officer cannot be examined as to communications made to him in official confidence, when the public interests, in the opinion of the judge, would suffer by the disclosure or by his attendance as a witness.

(4) A judge of a court of record cannot be compelled to testify respecting occurrences before him in a judicial proceeding and relating thereto. Cal. Code Civ. Proc. § 1880.

§ 201. **Credibility of Witnesses is for the Jury.**—The jury are the exclusive judges of the degree of credibility to be attached to the testimony; and it is reversible error for the court to impair these functions. *Moore v. State*, 68 Ala. 360; *Bowers v. People*, 74 Ill. 418; *Terry v. State*, 13 Ind. 70; *Knitner v. State*, 45 Ind. 175; *Ex parte Warrick*, 73 Ala. 57.

They may consider his capacity and opportunities for observing the transaction to which he testifies—the indications of bias or prejudice for or against the accused—the hesitancy, vacillation or contradiction with which he gives his testimony, his degree of interest in the prosecution, his occupation, his character, and, in fine, the general environment of the witness in reference to the transaction. *People v. Robles*, 34 Cal. 591; *Jones v. State*, 48 Ga. 163; *Brown v. State*, 18 Ohio St. 496; *Chester v. State*, 1 Tex. App. 702; *State v. Smallwood*, 75 N. C. 104; *State v. Miller*, 53 Iowa, 209; *People v. Bodine*, 1 Edm. Sel. Cas. 36.

The occupation of a person may always be shown, as bearing upon his credibility. *United States v. Duff*, 19 Blatchf. 9.

Witnesses with the best opportunity of knowing the facts are not to be believed in preference to other witnesses merely because of their superior opportunity, other conditions, such as general credibility, etc., not being equal. With equality in other respects, their better opportunity entitles them to be preferred. *Gregory v. State*, 80 Ga. 269.

While the law within certain limitations recognizes the competency of all men as witnesses, the question of their credibility may be seriously affected or totally impaired and in some instances utterly annihilated by the disclosures of the cross-examination whereby the moral rottenness of the witness is exposed, the entire absence of moral sense of accountability, the strong presence of a dominating sense, of personal gain or advantage—the equally controlling influences of affection and consanguinity, and in some instances the impulse and domination of unbridled malice. All these and other factors affecting the credibility of the witnesses are proper items for consideration by the jury and, in many instances, are of vital importance in the proper determination of the case.

I will here remark that the entire tenor and trend of modern legislation on the subject of the admission of parties as witnesses, and the removal of all disabilities that have heretofore hampered

evidentiary rules, is regarded generally with great satisfaction. The liberal provisions of the New York statute, previously referred to, have been generally adopted. The design of this statute obviously, was to remove all disabilities, even those that surround a felon; and courts do but violence to its plain import and intention, if they seek to circumscribe or restrict its beneficent operation.

The force of a witness's testimony depends upon the credit the jury think it entitled to; and no court has a right to lay down for a jury rules whereby they shall determine the force of evidence, irrespective of the credence they actually give it in their own minds. *People v. Jenness*, 5 Mich. 305; *People v. Schweitzer*, 23 Mich. 310; *People v. Wallin*, 55 Mich. 497. They are the sole and exclusive judges of the credibility of the witnesses. With that the court has nothing to do, and if they find from the evidence that any witness or witnesses have willfully testified falsely to any material fact in the cause, they are at liberty to disregard the whole or any portion of such witness or witness's testimony. *State v. Johnson*, 91 Mo. 439.

§ 202. **Effect of False Testimony on Credibility.**—The question frequently arises in criminal investigations, as to the degree, if any, of credibility that shall be accorded to a witness who is shown to have testified falsely—is his entire testimony to be excluded? Fortunately this question has been thoroughly ventilated by the supreme court of Ohio in the case of *Stoffer v. State*, 15 Ohio St. 487, 86 Am. Dec. 470. I excerpt from an opinion of exceptional merit delivered by *Mr. Justice Ranney* who read for reversal in that case: "An ancient maxim of the law of evidence—*falsus in uno, falsus in omnibus*—would seem to import such exclusion by raising a presumption of law, *juris et de jure*, that a witness who is certainly shown to have committed perjury upon one material point in the case should be deemed wholly unworthy of credit upon any other, and his testimony be absolutely rejected. In most of the cases brought to our attention in the argument, where this maxim has been referred to, no attempt has been made to define its limits and proper application, while in many it has been very inaccurately used as applicable to witnesses who have been merely contradicted upon some material point, without raising any just imputation of perjury against them. Among the elementary writers upon evidence whose

works have been examined by us, Mr. Starkie alone has stated the solid reasons upon which the maxim rests, and the case to which alone it can be applied. He says: 'As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, *falsus in uno, falsus in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result, his testimony is to be credited or rejected.' 'It is scarcely necessary to observe,' he adds, 'that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy.' 1 Stark. Ev. 873."

This subject was considered by the court in *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319, and each of the judges who delivered opinions in that case arrived at the conclusion that the jury were still at liberty to consider the evidence of such a witness; notwithstanding the fact of his having sworn falsely concerning the same subject upon a preceding examination. In referring to this subject, Denio, *Ch. J.*, stated that, "the true question is whether, when it appears that the witness has sworn differently upon the same point on a former occasion he is to be pronounced by the judge to be incompetent and his testimony stricken out and wholly excluded from consideration, as though he had been convicted of crime rendering him incompetent to testify as a witness, or whether the testimony remains in the case to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court and subject to the determination of the court having a jurisdiction to grant new trials in cases of verdicts against evidence. In my opinion, the latter is the correct principle of law." And as this was assented to by Ingraham, *J.*, who delivered the other opinion, and by all the other judges of the court, it seems to be sufficient to establish it as the principle which should be followed under this state of facts on the trial of an indictment. The same

point was further examined in *Deering v. Metcalf*, 74 N. Y. 501, where the cases were fully considered and the disposition of the court appeared to be to follow the principle which has just been stated, and not that in general terms announced in *Dunlop v. Patterson*, 5 Cow. 243. Further consideration was given on this subject in *People v. Reavey*, 38 Hun, 418, 4 N. Y. Crim. Rep. 1, where the same rule was followed, and as that case has been affirmed by the court of appeals it is in the nature of a conclusive authority.

"The tendency of modern authority is to relax and restrict the application of the maxim *falsus in uno, falsus in omnibus*. The jury are not bound to wholly discredit a witness if his testimony as to material facts is corroborated by other credible and unimpeached witnesses. In *Grimes v. State*, 63 Ala. 166, it is said, 'We are prepared to follow the line of authorities which hold the maxim is not a rule of law operating a disqualification of the witness, to be given in charge to the jury as imperatively binding them; that it is to be applied by the jury according to their sound judgment for the ascertainment and not for the exclusion of truth.' The charge given by the court is in accordance with this rule. It does not instruct the jury that they are bound to disregard the testimony of impeached witnesses, but left it to their sound discretion and judgment. . . . The present charge is based on the willful and corrupt false swearing of the witnesses. In such case there is no error in instructing the jury that they may disregard their evidence." *Jordan v. State*, 81 Ala. 20.

There is no rule of law that the entire testimony of such a witness must be disregarded. *People v. Reavey*, 38 Hun, 418, 4 N. Y. Crim. Rep. 1; *People v. Buddensiek*, 4 N. Y. Crim. Rep. 230; *People v. Stott*, 4 N. Y. Crim. Rep. 306.

CHAPTER XXX.

PRIVILEGE OF WITNESSES.

- § 203. *Refusal to Answer Criminating Questions.*
- 204. *Witness may Waive his Privilege.*
- 205. *Court must Determine the Force of the Refusal.*
- 206. *Restrictions upon the Privilege.*
- 207. *Recent Judicial Reviews of the Subject.*
- 208. *The Privilege of Attorneys.*
- 209. *The Privilege of Physicians.*
- 210. *The Privilege of Clergymen.*

§ 203. **Refusal to Answer Criminating Questions.**—It often happens that a question is asked a witness, the answer to which would not of itself be self-criminating, but would form a “link” in the chain of testimony which would involve a conviction. In such case, by numerous authorities, it is held that he is entitled to protection without explaining how the answer would criminate him. And the court is bound to advise him of the effect of an answer by him. *Lea v. Henderson*, 1 Coldw. 146; *Short v. State*, 4 Harr. (Del.) 568; *Marshall v. Riley*, 7 Ga. 367; *Richman v. State*, 2 G. Greene, 532; *Robinson v. Neal*, 5 T. B. Mon. 213; *Rutherford v. Com.* 2 Met. (Ky.) 387; *State v. Marshall*, 36 Mo. 400; *Coburn v. Odell*, 30 N. H. 540; *Janvrin v. Scammon*, 29 N. H. 280; *Bank of Salina v. Henry*, 2 Denio, 156; *United States v. Moses*, 1 Cranch, C. C. 170; *Sanderson’s Case*, 3 Cranch, C. C. 638; *United States v. Lynn*, 2 Cranch, C. C. 309; *Fries v. Brugler*, 12 N. J. L. 91; *Stewart v. Turner*, 3 Edw. Ch. 458; *United States v. Strother*, 3 Cranch, C. C. 432; *People v. Mather*, 4 Wend. 229; *Poole v. Perritt*, 1 Speer, L. 128; *Chamberlain v. Wilson*, 12 Vt. 491; *Cook v. Corn*, 1 Overt. 340; *State v. Edwards*, 2 Nott & McC. L. 13; *Southard v. Rexford*, 6 Cow. 259; *Pickard v. Collins*, 23 Barb. 444; *Pleasant v. State*, 15 Ark. 624; *Higdon v. Heard*, 14 Ga. 256; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417; Hageman, *Privileged Communications*, § 259.

§ 204. **Witness may Waive his Privilege.**—While it is the privilege of the witness to refuse to answer the question tending to criminate, he may waive his privilege at any stage of the

inquiry. *Higdon v. Heard*, 14 Ga. 256; *Pleasant v. State*, 15 Ark. 624; *Pickard v. Collins*, 23 Barb. 444; *Southard v. Rexford*, 6 Cow. 259; *State v. Edwards*, 2 Nott & McC. L. 13; *Cook v. Corn*, 1 Overt. 340; *Chamberlain v. Wilson*, 12 Vt. 491; *Poole v. Perritt*, 1 Speer, L. 128; *People v. Mather*, 4 Wend. 229; *Stewart v. Turner*, 3 Edw. Ch. 458. A waiver by his counsel is equally effective.

§ 205. **Court must Determine the Force of the Refusal.**—The court must, in the first instance, determine whether the question is such that it may be reasonably inferred that the answer made is criminating; and the nature of the answer, as it is known to the witness alone, he alone must decide. If the information sought may be self-accusing, and the witness says it is, he need not answer. *LaFontaine v. Southern Underwriters Asso.*, 83 N. C. 132.

"If a witness," says *Judge Denio*, "object to a question on the ground that an answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense," adding, "if the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged." *People v. Kelly*, 24 N. Y. 74.

It is of the utmost importance to heed this paragraph from the opinion of *Judge Denio*, as by express legislation in many jurisdictions a witness summoned before an inquisitorial body, judicial or legislative, is protected from criminal prosecution, in so far as his answers given before such body may be used against him. The corollary follows that in jurisdictions where such legislation prevails, the privilege of silence has become practically annihilated.

An early Iowa case declares that in no event is it left to the witness to determine, whether his answer would tend to criminate him or not. He is not required to explain how he would be criminated, for this would or might annihilate the protection secured by the rule. But it is for the court to determine whether the answer can criminate him, directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts which, together, may constitute a chain of testimony sufficient to warrant his conviction, but one part of which, by itself, could not produce such result. *State v. Duffey*, 15 Iowa, 425.

§ 206. **Restrictions upon the Privilege.**—The privilege of refusing to answer is restricted to questions, answering which may tend to criminate the witness, or expose him to punishment. *Hall v. State*, 40 Ala. 698. It is an established and universally accepted maxim of the common law, that a witness shall not be compelled to answer any question that tends to criminate him, or to expose him to a criminal prosecution, or to a penalty; which finds expression in the constitutional guaranty, that no person shall be compelled to give evidence against himself. The right of exemption extends, not only to answers which may criminate, but also to such as may tend to criminate.

On the trial of a female, charged with being a common prostitute, and having no honest employment, whereby to maintain herself, the petitioner was called by the prosecution and sworn as a witness. Having testified that he was a witness before the grand jury when the indictment was found, the question was proposed to him, whether or not he had had sexual intercourse with the accused within six months prior to the time he was before the grand jury. The court instructed the witness that it was his duty, and directed him, to answer the question. The witness refused to answer, whereupon the court adjudged him guilty of a contempt, and ordered his imprisonment. It was the province of the court to determine, in the first instance, whether a direct answer to the question proposed would furnish criminating evidence against the witness. The rule is founded on the duty of the court to take care that the exercise of the privilege shall not extend, by mistake or error of the witness, or on simulated pretense, to the suppression of evidence, which is necessary to the due administration of the law, and in giving which there can be no real and appreciable danger of crimination, or exposure to prosecution, or to any kind of punishment. *Calhoun v. Thompson*, 56 Ala. 166, 28 Am. Rep. 754. It is also of the highest importance, that the witness shall be protected in the proper and rightful exercise of his privilege, which has for its object the security of life and liberty. The court should not require the witness to fully explain the manner in which his answer may tend to criminate him, as the purpose of the privilege may be thereby defeated; nor should he be required to answer, when he claims his privilege, unless from the nature of the answer, and the circumstances of the case, it is evident to the court that his answer can not have any tendency to expose

him to a criminal charge or prosecution, or to a penalty. If the prosecution for the offense is barred by the statute of limitations, the reason of the privilege ceases, and the witness should be compelled to answer. See cases cited in § 205.

Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases. 1 Gilbert, Ev. 277; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Coveney v. Tannahill*, 1 Hill, 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *People v. Blakeley*, 4 Park. Crim. Rep. 176; 1 Whart. Crim. Law, § 773; *Roscoe, Crim. Ev.* 150; *People v. Van Alstine*, 57 Mich. 69.

§ 207. **Recent Judicial Reviews of the Subject.**—*Judge Mitchell* of the supreme court of Minnesota has furnished a singularly apt exposition on this entire subject in the case of *State v. Thaden*, 43 Minn. 253.

This decision was rendered in 1890 and states the rules that obtain in all jurisdictions with reference to the topic.

"While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. To hold that the witness himself is the sole and absolute judge whether the answer will criminate him would be to place it in his power to withhold evidence whenever he saw fit. Such a rule could not be tolerated for a moment. On the other hand, to require him to state what answer he would have to give, or to explain fully how his answer would tend to criminate, would deprive him of the very protection which the law designs to afford. Moreover, the reason of the rule forbids that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein; but it should be extended to the disclosure of any fact which might constitute

an essential link in a chain of evidence by which guilt might be established, although the fact alone would not indicate any crime. Hence the problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the court must be able to see, from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. The following are a few of the leading cases treating on this subject: 1 Burr's Trial, 255; *People v. Mather*, 4 Wend. 229; *Ward v. State*, 2 Mo. 120; *Kirschner v. State*, 9 Wis. 140; *Chamberlain v. Wilson*, 12 Vt. 491; *Janvrin v. Scammon*, 29 N. H. 280; *Fries v. Brugler*, 12 N. J. L. 91; *Temple v. Com.* 65 Va. 892; *La Fontaine v. Southern Underwriters Asso.*, 83 N. C. 132; *Reg. v. Boyes*, 1 Best & S. 311. The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in *Reg. v. Boyes, supra*, 'that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.' To this we would add that, when such reasonable appre-

hension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what *Chief Justice* Marshall meant by his statement of the rule in the Burr trial. As was said in *Reg. v. Boyes*, *supra*, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things; not a danger of an imaginary or unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice." *Lea v. Henderson*, 1 Coldw. 146; *Robinson v. Neal*, 5 T. B. Mon. 213; *Short v. State*, 4 Harr. (Del.) 568; *State v. Marshall*, 36 Mo. 400; *Cockburn v. Odell*, 30 N. H. 540; *Marshall v. Riley*, 7 Ga. 367; *Richman v. State*, 2 G. Greene, 532; *Bank of Salina v. Henry*, 2 Denio, 155; *People v. Mather*, 4 Wend. 229; *United States v. Moses*, 1 Cranch, C. C. 170; *United States v. Lynn*, 2 Cranch, C. C. 309; *United States v. Strother*, 3 Cranch, C. C. 432; *Chamberlain v. Wilson*, 12 Vt. 491; *Pleasant v. State*, 15 Ark. 624; *Pickard v. Collins*, 23 Barb. 444.

A further review of the subject in adjudged cases will be useful.

In *Respublica v. Gibbs*, 3 Yeates, 429, and 4 U. S. 4 Dall. 253, 1 L. ed. 822, in 1802, the declaration of rights in the constitution of Pennsylvania of 1776, declared that no man can "be compelled to give evidence against himself," and the same language was found in the constitution of 1790. Under this, the supreme court of Pennsylvania held that the maxim that no one was bound to accuse himself extended to cases where the answer might involve him in shame or reproach; and it held to the same effect in *Galbreath v. Eichelberger*, 3 Yeates, 515, in 1803.

In June, 1807, *Chief Justice* Marshall, in the Circuit Court of the United States for the District of Virginia, in the Burr trial (1 Burr's Trial, 244) on the question whether the witness was privileged not to accuse himself, said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest

with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he says upon his oath, that the answer would criminate himself, the court can demand no other testimony of the fact. . . . According to their statement" (the counsel for the United States) "a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe, but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description. The court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

In *Higdon v. Heard*, 14 Ga. 255, in 1853, it was said that the constitution of Georgia declared "that no person shall be compelled in any criminal case to be a witness against himself." In that case the plaintiff had filed a bill in equity praying a discovery as to property which he alleged the defendants had won from him in a game of cards. The bill was demurred to on the ground that the law of the state compelling a discovery of gaming transactions was unconstitutional, because such transactions were criminal, and the statute did not grant an absolute and unconditional release from punishment, and because the defendants could not make the discovery sought without criminating themselves and incurring penalties. The demurrer was overruled by the supreme court of Georgia, on the ground that, although all persons were protected by the constitution from furnishing evidence against themselves which might tend to subject them to a criminal prose-

cution, they received their protection by virtue of an act of Georgia of 1764, because, under that act, their answers could not be read in evidence against them in any criminal case whatever, being excluded by the constitution.

In *Ex parte Rowe*, 7 Cal. 484, in 1857, the constitution of California of 1849 provided, art. 1, § 8, that no person shall "be compelled in any criminal case to be a witness against himself." Rowe had been committed for refusing to answer, under an order of the court, certain questions propounded to him by the grand jury in an examination concerning the disposition of certain moneys taken from the state treasury, on the ground that his answer would disgrace him and would tend to subject him to a prosecution for felony. The supreme court of California, on *habeas corpus*, considered the construction and constitutionality of the 5th section of an act passed April 16, 1855, which provided, that "the testimony given by such witness shall in no instance be used against himself in any criminal prosecution." The court held that the provision of the constitution was intended to protect the witness from being compelled to testify against himself in regard to a criminal offense; that he could not be a witness against himself unless his testimony could be used against him in his own case; and that the statute gave the witness that protection which was contemplated by the constitution, and therefore he was bound to answer.

The constitution of the state of New York declares, that no person shall "be compelled, in any criminal case, to be a witness against himself." In the case of *People v. Kelly*, 24 N. Y. 74, one Hackley, as a witness before the grand jury on a complaint against certain aldermen for feloniously receiving a gift of money under an agreement that their votes should be influenced thereby in a matter then pending before them, in answer to a question put to him as to what he had done with certain money which he had received, said that any answer which he could give to the question would disgrace him, and would have a tendency to accuse him of a crime and he demurred to the question. Having been ordered by the court of general sessions of the peace to answer it, he still refused and was adjudged guilty of contempt and put in prison. On a writ of *habeas corpus*, he was remanded into custody by the supreme court, and he appealed to the court of appeals.

That court, speaking by *Judge Denio*, said: "The mandate that an accused person should not be compelled to give evidence against himself, would fail to secure the whole object intended if a prosecutor might call an accomplice or confederate in a criminal offense, and afterwards use the evidence he might give to procure a conviction, on the trial of an indictment against him. If obliged to testify, on the trial of the co-offender, to matters which would show his own complicity, it might be said, upon a very liberal construction of the language, that he was compelled to give evidence against himself—that is, to give evidence which might be used in a criminal case against himself. . . . It is, of course, competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify, on the trial of another person, to facts which would prove himself guilty of a crime, without indemnifying him against the consequences, because, by a legal construction, the constitution would be found to forbid it." But the court went on to say: "If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission, on his own trial, would tend to prove him guilty of a criminal offense. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term, 'criminal case,' used in the clause must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offense. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally, touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against him-

self, by force of any compulsion used toward him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself."

In *Emery's Case*, 107 Mass. 172, Emery was summoned as a witness before the joint special committee of the general court appointed "to inquire if the state police is guilty of bribery and corruption." Interrogatories were propounded to him by the committee, which he declined to answer. On a report of the facts to the senate, it ordered his arrest for contempt. He was brought before the senate and asked the following question: "Are you ready and willing to answer . . . the following questions, namely: First, Whether, since the appointment of the state constabulary force, you have ever been prosecuted for the sale or keeping for sale of intoxicating liquors. Second. Have you ever paid any money to any state constable, and do you know of any corrupt practice or improper conduct of the state police? If so, state fully what sums, and to whom you have thus paid money, and also what you know of such corrupt practice and improper conduct." He answered in writing as follows: "Intending no disrespect to the honorable senate, I answer, under advice of counsel, that I am ready and willing to answer the first question, but I decline to answer the second question, upon the grounds, First, that the answer thereto will accuse me of an indictable offense; Second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense." The senate thereupon committed him to the custody of the sergeant at arms, to be confined to jail for twenty-five days, or until the further order of the senate, unless he should sooner answer the questions. He was imprisoned accordingly, and the case was brought before *Judge Wells* of the supreme judicial court on a writ of *habeas corpus*, and was fully argued. It was held under advisement and for conference with the other judges; and in the opinion subsequently delivered by *Judge Wells* it is stated, that that opinion had the approval and unanimous concurrence of all the members of the court. It is said in the opinion: "It is apparent that an affirmative answer to the question put to him might tend to show that he had been guilty of an offense."

In regard to the clause above quoted from the bill of rights, the opinion says: "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted

for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner; although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. In the absence of regulation by statute, the protection against such self-accusation is secured by according to the guilty person, when called upon to answer as witness or otherwise, the privilege of then avowing the liability and claiming the exemption; instead of compelling him to answer and then excluding his admissions so obtained, when afterwards offered in evidence against him. This branch of the constitutional exemption corresponds with the common law maxim, *nemo tenetur seipsum accusare*, the interpretation and application of which has always been in accordance with what has been just stated. Broom, *Legal Maxims* (5th ed.) 1968; Wingate, *Maxims*, 486; Roscoe, *Crim. Ev.* (2d Am. ed.) 159; Stark, *Ev.* (8th Am. ed.) 41, 204 and notes; 1 Greenl. *Ev.* § 451 and notes." The opinion then cites the case of *People v. Kelly*, 24 N. Y. 74, as holding that the clause in the constitution of New York of 1846 protected a witness from being compelled to answer to matters which might tend to criminate himself, when called to testify against another party; and also *People v. Mather*, 4 Wend. 229, as declaring that the exemption in the constitution of New York extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although that fact alone would not indicate any crime.

In *Cullen v. Com.* 24 Gratt. 624, in 1873, Cullen, when asked before a grand jury to state what he knew of a certain duel, declined to answer, because the answer would tend to criminate him. The hustings court ordered him to answer, and, on his still

refusing to do so, fined him and committed him to jail. The case was brought before the court of appeals of Virginia. The bill of rights of the constitution of Virginia of 1870, in § 10 of article 1, provided that no man can "be compelled to give evidence against himself." That provision had existed in the bill of rights of Virginia as far back as June 12, 1776, and of it the court of appeals said it was the purpose of its framers "to declare, as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding;" and that the provision could not be confined "only to cases in which a man is called on to give evidence himself in a prosecution pending against him."

The opinion then cited *People v. Kelly*, 24 N. Y. 74, and *Emery's Case*, 107 Mass. 172, as sustaining its view, and proceeded to consider the effect of an act of Virginia, passed October 31, 1870, in regard to dueling, which provided as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required, in any prosecution against any person but himself, for having fought, or aided, or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution against himself." The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was, therefore, to that extent, unconstitutional and void. It was held further that, before the constitutional privilege could be taken away by the legislature, there must be absolute indemnity provided; that nothing short of complete amnesty to the witness, an absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish that indemnity; that the statute in question did not furnish it, but only provided that the statement made by the witness should not be used against him in a prosecution against himself; that, without using one word of that statement, the attorney for the commonwealth might in many cases, and in a case like that in hand, inevitably would, be led by the testimony of the witness to means and sources of information which might result in crim-

inating the witness himself; and that this would be to deprive the witness of his privilege, without indemnity. The judgment of the hustings court was reversed.

Article 15 of the bill of rights in the constitution of New Hampshire of 1792 declared that no subject shall "be compelled to accuse or furnish evidence against himself." In *State v. Newell*, 58 N. H. 314, in 1878, Newell refused to testify before a grand jury as to whether, as a clerk for one Goodwin, he had sold spirituous liquors, and whether Goodwin sold them or kept them for sale. He declined to answer on the ground that his evidence might tend to criminate himself. A statute of the state (Gen. Stat. chap. 99, § 20) provided as follows: "No clerk, servant, or agent of any person accused of a violation of this chapter, shall be excused from testifying against his principal, for the reason that he may thereby criminate himself; but no testimony so given by him shall, in any prosecution, be used as evidence, either directly or indirectly against him, nor shall he be thereafter prosecuted for any offense so disclosed by him." A motion having been made before the supreme court of New Hampshire, for an attachment against him for contempt for refusing to testify, that court, after quoting the provision in the bill of rights, said: "The common law maxim (thus affirmed by the bill of rights) that no one shall be compelled to testify to his own criminality, has been understood to mean, not only that the subject shall not be compelled to disclose his guilt upon a trial of a criminal proceeding against himself, but also that he shall not be required to disclose, on the trial of issues between others, facts that can be used against him as admissions tending to prove his guilt of any crime or offense of which he may then or afterwards be charged, or the sources from which, or the means by which, evidence of its commission, or of his connection with it may be obtained. *Emery's Case*, 107 Mass. 172, 181."

In regard to the statute, the court said that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; that he was to be secured against all liability to future prosecution as effectually as if he were wholly innocent; that this would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which

he might be required to testify; that the statute of New Hampshire went further than the statute of Massachusetts considered in Emery's case, because it provided that the witness should not be thereafter prosecuted for any offense so disclosed by him; that the witness had, under the statute, all the protection which the common law right, adopted by the bill of rights in its common law sense, gave him; that if he should be prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer in bar or abatement of the prosecution against himself; and that, unless he should testify, the motion for the attachment must be granted.

In 1880, in *LaFontaine v. Southern Underwriters Asso.* 83 N. C. 132, the constitution of North Carolina of 1876 had provided, in the declaration of rights (art. 1, § 11) that, "in all criminal prosecutions, every man has the right . . . to . . . not be compelled to give evidence against himself." One Blacknall, as a witness in a hearing before a referee in a civil suit, had refused to answer a question as to his possession of certain books, on the ground that indictments were pending against him, connected with the management of the affairs of the association owning the books, and that his answer to the question might tend to criminate him. The case was heard before an inferior state court, which ruled that he must answer the question. On appeal to the supreme court of North Carolina, it is held that the fair interpretation of the constitutional provision was to secure a person, who was or might be, accused of crime, from making any compulsory revelations which might be used in evidence against him on his trial for the offense, that, as the witness was protected from the consequences of the discovery, and the facts elicited could be given in evidence in no criminal prosecution to which they were pertinent, the plaintiff in the case was entitled to all the information which the witness possessed, whether it did or did not implicate the witness in a fraudulent transaction, that the inquiry could not be evaded upon any ground of the self-criminating answer which might follow, although the answers of the witness could not be used against him in any criminal proceeding whatever; and that his constitutional right not to "be compelled to give evidence against himself" would be maintained intact and full.

In *Temple v. Com.* 75 Va. 892, in 1881, the same § 10 of

article 1 of the bill of rights of the constitution of Virginia of 1870, that was considered in *Cullen v. Com.* 24 Gratt. 624, was in force. An indictment had been found by a grand jury, on the evidence of Temple, against one Berry for setting up a lottery. On the trial of Berry before the petit jury, Temple refused to testify, on the ground that by so doing he would criminate himself; and for such refusal he was fined and imprisoned for contempt by the hustings court. The case was taken to the court of appeals by writ of error. The court cited with approval *Cullen v. Com. supra*, and held that it was applicable. It appeared that in the hustings court, the attorney for the commonwealth was asked whether any prosecution was pending against Temple in that court or whether it was the intention of such attorney to institute a proceeding against Temple for being concerned in a lottery, to both of which questions he replied in the negative.

The court of appeals held that Temple had a right to stand upon his constitutional privilege, and not to trust to the chances of a further prosecution; that the court could offer him no indemnity that he would not be further prosecuted, nor could the attorney for the commonwealth; that Temple had a right to remain silent whenever any question was asked him, the answer to which might tend to criminate himself; that the great weight of authority in the United States was in favor of the rule that, when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer, unless it was perfectly clear, from a careful consideration of all the circumstances in the case, that the witness was mistaken, and that the answer could not possibly have such a tendency.

In *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, in 1886, the court, in considering the 4th and 5th amendments to the Constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and the 4th Amendment, which declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, said, speaking by *Mr. Justice Bradley*, p. 631 [751]: "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts

of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." It was further said, p. 633 [752]: "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the 5th Amendment, and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure,' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the 4th Amendment of the Constitution, and of that portion of the 5th Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the 5th Amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the 4th Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half

their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In that case, the fifth section of the Act of June 22, 1874 (18 Stat. at L. 187) which authorized the court in revenue cases to require the defendant or claimant to produce his private papers in court, or else the allegations of the government's attorney would be taken as confessed, was held to be unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the 4th and 5th amendments to the Constitution; and it was held that a proceeding to forfeit the goods was a criminal case within the meaning of the 5th Amendment. *Mr. Justice Miller*, in the concurring opinion of himself and *Chief Justice Waite* in the case, agreed that it was a criminal one, within the meaning of the 5th Amendment, and that the effect of the Act of Congress was to compel the party on whom the order of the court was served, to be a witness against himself.

In *People v. Sharp*, 107 N. Y. 427, in 1887, the court of appeals of New York had under consideration the provision of Article 1, § 6, of the Constitution of New York of 1846, that no person shall "be compelled, in any criminal case, to be a witness against himself," and the provision of section 79 of the penal code of New York, title 8, chapter 1, in regard to bribery and corruption, which was in these words: "A person offending against any provision of any foregoing section of this code relating to bribery, is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment of prosecution." Sharp and others were indicted for bribing a member of the common council, and Sharp was tried separately. It was proved that he had been examined as a wit-

ness before a committee of the state senate, and there gave testimony of his complicity in the crime; and that testimony was offered in evidence by the prosecution. The testimony had been given under the compulsion of a subpoena, and was admitted at the trial, against the objection that the disclosures before the senate committee were privileged. The court of appeals held that § 79 of the penal code made the constitutional privilege inapplicable, because it indemnified or protected the party against the consequences of his previous testimony. The court cited with approval the case of *People v. Kelly*, 24 N. Y. 74.

In *Bedgood v. State*, 115 Ind. 275, in 1888, the supreme court of Indiana had under consideration the provision of art. 1, § 14 of the bill of rights of the constitution of Indiana of 1851, which provides that "no person in any criminal prosecution shall be compelled to testify against himself," and the provisions of § 1800 of the revised statutes of Indiana of 1881, to the effect that testimony given by a witness should not be used in any prosecution against him. On a trial before a petit jury in a criminal case against others, a woman had refused to answer a question, on the ground that the answer might criminate her. The supreme court held that, as the statute prohibited her testimony from being used against her, it completely protected her, and the judgment was reversed because the trial court had erroneously refused to require her to answer the question.

This review of the cases shows that in the constitution of Georgia, California, and New York, the provision is identically or substantially that of the Constitution of the United States, namely, that no person shall "be compelled in any criminal case to be a witness against himself;" while in the constitution of Pennsylvania, Arkansas, Indiana, Massachusetts, Virginia, New Hampshire, and North Carolina it is different in language, and to the effect that "no man can be compelled to give evidence against himself;" or that, in prosecutions, the accused "shall not be compelled to give evidence against himself;" or that "no person in any criminal prosecution shall be compelled to testify against himself," or that no person shall be "compelled to accuse or furnish evidence against himself;" or that no man can "be compelled to give evidence against himself;" or that, in all criminal prosecutions, "every man has the right to not be compelled to give evidence against himself."

Under the constitutions of Arkansas, Georgia, California, Indiana, New York, New Hampshire, and North Carolina it was held that a given statutory provision made it lawful to compel a witness to testify; while in Massachusetts and Virginia it was held that the statutory provisions were inadequate in view of the constitutional provision. In New Hampshire, and in New York under the penal code, it was held that the statutory provisions were sufficient to supply the place of the constitutional provision, because, by statute, the witness was entirely relieved from prosecution.

But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be "compelled to accuse or furnish evidence against himself;" such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be "compelled in any criminal case to be a witness against himself."

§ 208. **The Privilege of Attorneys.**—The rule of privileged communications as applied to the relation of attorney and client in civil matters, is substantially the same as in the administration of criminal justice. Whether the protection can be removed without the client's consent in cases in which the interest of criminal justice requires the production of the evidence may admit of some doubt. Hageman, Privileged Communications, § 252, citing Taylor, Ev. § 929; *Reg. v. Tylney*, 18 L. J. M. C. 37; *Reg. v. Tufts*, 1 Den. C. C. 319.

A paragraph from *Judge Cooley* is pertinent in this connection :

"In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents. Among these is that shield of protection which is thrown around the confidence the relation of counsel and client requires, and which does not permit the disclosure by the former, even in

the courts of justice, of communications which may have been made to him by the latter, with a view to pending or anticipated litigation. This is the client's privilege; the counsel cannot waive it; and the court would not permit the disclosure even if the client were not present to take the objection." Cooley, Const. Lim. (6th ed.) 497.

In the case of *Tichborne v. Lushington*, Shorthand Notes, p. 5211, out of which the prosecution of Orton for perjury arose, Bovill, *Ch. J.*, at the close of the case said: "I believe the law is, and properly is, that if a party consults an attorney, and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed, if any such privilege should be contended for or existed, it would work most grievous hardships on an attorney, who, after he had been consulted on what subsequently appeared to be a manifest crime and fraud, would have his lips closed, and might place him in a very serious position of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself. . . . There is no privilege in the case which I have suggested, of a party consulting another, a professional man, as to what may afterwards turn out to be a crime or fraud, and the best mode of accomplishing it." *Reg. v. Cox*, L. R. 14 Q. B. Div. 153.

In order that the rule may apply there must be both professional confidence and professional employment; but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his advisor professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts which is the foundation of the supposed confidence does not exist. The solicitor's advice is obtained by a fraud. *Reg. v. Cox, supra*.

The only thing which we feel authorized to say upon this matter is, that in each particular case the court must determine upon the facts actually given in evidence or proposed to be given in evidence whether it seems probable that the accused person may have consulted his legal advisor, not after the commission of the

crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question, whether the advice was taken before or after the offense, will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. *Reg. v. Cox, supra.*

Judge Cooley says that "it has been intimated in New York that the statute making parties witnesses has done away with the rule which protects professional communications. *Mitchell's Case*, 12 Abb. Pr. 249; *note* to 1 Phil. Ev. by Cowen, Hill & Edwards, 159. Supposing this to be so in civil cases, the protection would still be the same in the case of persons charged with crime, for such persons cannot be compelled to give evidence against themselves, so that the reason for protecting professional confidence is the same as formerly." Cooley's Const. Lim. (6th ed.) 408.

The competency of attorneys and counsel to testify as to communications made to them, and matters that they have learned in the course of their professional employment, has been extensively discussed by the courts of the state, and the cases involving that question thoroughly examined. *Whiting v. Barney*, 30 N. Y. 330; *Coveney v. Tannahill*, 1 Hill, 33; *Bank of Utica v. Mercereau*, 3 Barb. Ch. 533. The rule deducible from the authorities is, that all communications made by a client to his counsel, for the purposes of professional advice or assistance, are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid; that, where the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties. *Maxham v. Place*, 46 Vt. 434; *Graham v. People*, 63 Barb. 468; *Bowers v. State*, 29 Ohio St. 542; *Jenkinson v. State*, 5 Blackf. 465; *March v. Ludlum*, 3 Sandf. Ch. 45; *Whiting v. Barney, supra*; *Crosby v. Berger*, 11 Paige, 377; *Orton v. McCord*, 33 Wis. 205; *Chahoon v. Com.* 21 Gratt. 822; *State v. Hazleton*, 15 La. Ann. 72.

The immunities that surround the communications between

lawyer and client, are all dissolved should it appear that the communication was in furtherance of an illegal object.

When an attorney prostitutes the privileges of his high calling to base and dishonest ends with the connivance and assistance of his clients the law very properly withdraws its fostering care and protection from the disclosures they may make and they both stand before the court as criminals, deprived of any right to evoke the protection that is always the privilege of honest men.

§ 209. **The Privilege of Physicians.**—The statutory law of New York from a very early period has extended the same protection that may be invoked between attorney and client to the relations that subsist between physician and patient.

At common law, the information obtained by physicians in their professional intercourse with patients was not privileged from disclosure. The "information," of which the statute forbids the disclosure, is not confined to communications made by the patient, but extends to all facts which necessarily come to the knowledge of the physician in a professional case. The statute is for the protection of the patient and not the physician, and being of a remedial nature, it should be construed liberally and with reference to the evil it was designed to remedy. To bring a case within the protection of the statute it is not necessary that the technical relation of physician and patient should exist; but the statute is applicable where a physician has attended upon a person under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit was so regarded and acted upon by the person so attended. *People v. Stout*, 3 Park. Crim. Rep. 670.

The statutory provision above referred to ultimately crystalized in § 834 of the New York code of civil procedure which is framed in the following language: "A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."

Under this provision it was held that the burden of proof is upon the defendant to show, and that in the first instance, that the technical relation of physician and patient existed between these parties. *Cary v. White*, 59 N. Y. 339; *Steele v. Ward*, 30 Hun, 560; *Edington v. Aetna L. Ins. Co.* 77 N. Y. 564.

When a party seeks to exclude evidence under this section the

burden is upon him to bring the case within its purview. He must make it appear, if it does not otherwise appear, that the information which he seeks to exclude was such as the witness acquired in attending the patient in a professional capacity not only, but he must also show that it was such as was necessary to enable him to act in that capacity. *Edington v. Aetna L. Ins. Co.* 77 N. Y. 564.

The object of the statute is plainly this, that persons may feel sure that whatever they disclose to a physician, in his professional capacity, in regard to the bodily condition, whether it be by word or by allowing a physical examination, shall be held sacred. It matters not whether the patient or some one else pays the doctor's bill, or whether it is ever paid at all. And it matters not whether the patient visits the physician to relieve his own anxiety, or to relieve that of some friend. The information which he thus enables the physician to acquire is protected. Nor does it make any difference that no prescription is made. *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617.

§ 210. **The Privilege of Clergymen.**—"A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs." N. Y. Code Civ. Proc. § 833.

This rule very generally obtains both in this country and in England. *Butler v. Moore*, decided in 1802 by the Irish Master of the Rolls (Sir Michael Smith) and cited in McNally's Evidence, 253, 254. See also *Broad v. Pitt*, 3 Car. & P. 518.

The *contra* view is stated in *note* 44 of Stephen's Digest of the Law of Evidence.

For an extended review of this entire subject see 2 Rice, Civil Evidence, chap. XX.

CHAPTER XXXI.

THE EXAMINATION OF WITNESSES.

- § 211. *Method Discretionary with the Trial Court.*
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§ 211. Method Discretionary with the Trial Court.—

Witnesses examined in open court are usually first examined in chief, then cross-examined, and then re-examined.

But under modern methods, it is largely a matter of discretion with the court, to what extent the examination shall continue and in what order the evidence shall be produced. *Duncan v. McCullough*, 4 Serg. & R. 480; *Adrianse v. Arnot*, 31 Mo. 471; *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78; *Com. v. Lyden*,

113 Mass. 452; *Mulhollin v. State*, 7 Ind. 646; *State v. Scott*, 80 N. C. 365; *Carney v. State*, 79 Ala. 14.

§ 212. **Strict Mode of Procedure Seldom Pursued.**—The strict mode of procedure is scarcely ever pursued in active practice. The office of a direct examination, or examination in chief as it is also termed, is to lay before the court and the jury, the whole of the evidence of the witness that is relevant and material. The office of a re-examination is to explain, to rectify and put in order such matters as have been affected by the cross-examination. The examination of a single witness is an illustration of the manner of conducting the examination of all the witnesses in the cause. If the strict rules of examination are followed, the party who produces a witness is bound to ask all material questions on the direct examination, and if this is omitted it cannot be done in reply, for no new question can be put in reply which is not connected with the cross-examination and which does not tend to explain it. *Ford v. Niles*, 1 Hill, 300; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *Meyer v. Goedel*, 31 How. Pr. 456; *Anthony v. Smith*, 4 Bosw. 503; *Shepard v. Potter*, 4 Hill, 202; *Hastings v. Palmer*, 20 Wend. 225; *Leland v. Bennett*, 5 Hill, 286; *Romertze v. East River Nat. Bank*, 2 Sweeny, 82; *Seibert v. Allen*, 61 Mo. 482; *Ober v. Carson*, 62 Mo. 209.

As a general rule, leading questions are not permitted upon a direct examination (*People v. Oyer & Terminer Ct.* 83 N. Y. 436, 459, 460); but the rule is relaxed where an omission of the witness's testimony is evidently caused by a want of recollection which a suggestion may assist. *Cheeny v. Arnold*, 18 Barb. 434. See *O'Hagan v. Dillon*, 76 N. Y. 170. Or, where the witness is hostile to the party calling him (*Williams v. Eldridge*, 1 Hill, 249–255; *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127–139; *Bradshaw v. Combs*, 102 Ill. 428), or very ignorant (*Doran v. Mullen*, 78 Ill. 342; *State v. Benner*, 64 Me. 267); and questions, though leading in form, are always competent, when merely intended to direct the attention of the witness to the subject-matter of his testimony. *Lowe v. Lowe*, 40 Iowa, 220.

Where the question asked is of doubtful propriety and yet it is apparent that under a particular view of the case it may be relevant the opposing counsel or the court may demand a statement of what it is proposed to prove and in what way its relevancy to the issue may be shown. *Wood v. State*, 92 Ind. 269.

No witness can be heard except upon oath or affirmation; and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they so elect.

§ 213. **Witness Must Testify to Facts Within his Knowledge.**—No principle is better settled than that the belief, thoughts or operation of the mind of a witness are not admissible evidence, as a general rule. He must testify only as to *facts* within his knowledge, and cannot give evidence outside of this, unless a case is made out where his opinion may be asked. *Abbott v. People*, 86 N. Y. 460; *Gutchess v. Gutchess*, 66 Barb. 483; *Rich v. Jakway*, 18 Barb. 357; *Morehouse v. Mathews*, 2 N. Y. 514; *Gibson v. Williams*, 4 Wend. 320.

Generally oral evidence must in all cases whatever, be direct; that is to say—

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Stephen, Dig. art. 62. See *Teerpenning v. Corn Exchange Ins. Co.* 43 N. Y. 279. *Trull v. True*, 33 Me. 367. So oral evidence is admissible if the witness swears to a certain fact as true to the “*best of his knowledge and belief*,” or to his “*best impression*.” *McLean v. Clark*, 47 Ga. 24. As the accuracy of his “*impression*” is for the determination of the jury. *Crowell v. Western Reserve Bank*, 3 Ohio St. 406; *Duvall v. Darby*, 38 Pa. 56. It should be added however in this connection, in regard to this subject of impression, that where they are vague and illusive—not sufficiently defined in or impressed upon the memory to leave a substantial reason as a basis for the testimony, the evidence should be rejected. *Humphries v. Parker*, 52 Me. 502; *State v. Flanders*, 38 N. H. 324; *Ives v. Hamlin*, 5 Cush. 534; *People v. Wreden*, 59 Cal. 392; *Wiggins v. Holley*, 11 Ind. 2.

§ 214. **Examination in Chief—Views of Prominent Text Writers.**—After a witness has been regularly sworn, the party

who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that the leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggests to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory and one which, if answered by "yes" or "no," would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry.

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. Russell, Crimes, chap. 5, p. 913, 915, § 2.

§ 215. **Object of the Examination in Chief.**—The object of the examination in chief is to elicit from the witness all the material facts which tend to prove the case of the party who calls the witness. In such a case, as the presumption and the ordinary fact are that the witness, having been chosen by the party who calls him, is favorable to his cause, and therefore likely to overstate or misstate the circumstances which conduce to establish the party's case, it is a principal rule that—

On an examination in chief, a witness must not be asked leading questions.

The simple meaning of this rule is, that a party who calls a witness to prove a case must not suggest answers to the witness, nor frame his question in such a manner that the witness by answering merely "yes" or "no," shall give the reply and the evidence which the party wishes to elicit. A question is said to be leading when the words which the witness is expected and required to utter, are put into his mouth, or when it suggests to the witness the answer which the examiner wishes or expects to have; and such a question is inadmissible, because the object of calling witnesses and examining them *viva voce* in open court is, that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest. Such a course would strike radically at the credibility of all oral evidence, and

therefore it is a sound and established rule, that, on the examination in chief, leading questions must not be asked. Heard, Crim. Law, p. 209.

It is matter of discretion with the court before whom a trial is had, whether they will or will not compel counsel to disclose what they expect to prove by a witness, before he is examined in chief. Where the case is one of delicacy and importance, and the evidence is nicely balanced, and the scale is liable to be affected by slight circumstances, courts are vigilant in preventing any extraneous or irrelevant matter from being brought before the jury. In such cases counsel will be required to state the substance of what they expect to prove, in order that, if irrelevant or improper, the evidence may not be given; when the lines of the case are more broadly marked, less caution is necessary as the rights of the parties may be sufficiently protected by the court deciding upon the competency or relevancy of the evidence as it falls from the witness. *People v. White*, 14 Wend. 111.

§ 216. **Rule as to Leading Questions.**—Though the rule is, that leading questions may not be put in examination in chief, there are certain exceptions, some allowed as of right, others for convenience sake.

(a) For the purpose of identifying persons or things which have already been described, the attention of the witness may be directly pointed to them.

(b) When a witness is called to contradict another, who has sworn to a certain fact, he may be asked in direct terms whether the fact ever took place.

(c) When the witness is, in the opinion of the judge, hostile to the party calling him.

(d) When the witness is unable to answer general questions from defective memory, or the complicated nature of the matter as to which he is interrogated.

Leading questions are also not objected to—

(a) When merely introductory, so as to save time.

(b) When the particular matter is not disputed. Thus, where a witness, having deposed to a fact, has not been cross-examined on it, questions may be put which assume that fact. Harris, Crim. Law, p. 355.

The first general rule is, that a party to whom a witness is called, cannot ask him leading questions, that is, questions sug-

gesting the answer desired. 1 Phil. Ev. Cowen & Hill's *Notes*, 268; *Chambers v. People*, 5 Ill. 355; *Williams v. Jarrot*, 6 Ill. 130. This rule proceeds upon the supposition that the witness is favorable to the party calling him. Where such is not the fact, and the witness appears to be hostile, the rule is relaxed, and a more searching mode of examination is permitted, partaking of the character of a cross-examination. *Starks v. People*, 5 Denio, 106; *Williams v. Jarrot*, *supra*. Questions of introductory matter, leading and directing the mind and attention of the witness to the main inquiry, and which will not be conclusive upon any of the points in the case, are not liable to the objection of being leading. 1 Phil. & Am. Ev. 888; *Williams v. Jarrot*, *supra*. In some cases, however, leading questions are permitted on a direct examination. Thus, where an omission in the testimony of the witness is caused by a want of recollection, which a suggestion may assist, such suggestion is permitted to be made. As, where a witness called to prove a partnership, is not able at the moment to specify the several names of the partners, a number of names, containing the names of the partners among others, may be suggested to him for the assistance of his memory. Stark. N. P. 100; Haines, Treatise, p. 672.

A recent celebrated criminal case reported from California discloses the latitude in which leading questions may be propounded by the trial court. The conviction was for murder, and wife murder at that, and was based upon circumstantial evidence and the opinion of experts. After the accused had been convicted and sentenced to death, the brother of the deceased wife confessed the crime, exculpated the prisoner and then committed suicide. It would seem, that, during the progress of the trial, the presiding judge became very much dissatisfied with the character of the expert testimony; and the appellate court could see no valid objection to such a proceeding, except that, in form, some of the questions asked were leading and suggestive. Patterson, *Justice*, says: "If they assumed facts not proved, the attention of the court ought to have been directed to this objection. While it was probably not the duty of the defendant to urge his objections to questions asked by the court with the formality and persistence required when counsel for the prosecution were examining the witness, yet the attention of the court ought to have been called in some manner to the objectionable matters. It is in the

discretion of the court to allow counsel to ask leading questions and there is no reason why the court may not, of its own motion, ask questions in that form." *People v. Bowers*, 79 Cal. 415.

Leading questions may be put to an unwilling witness, but there is some conflict of authority as to whether if a witness unexpectedly gives testimony adverse to the party calling him, such party may ask him if he has not on another particular occasion made a contrary statement. We think the cases which hold that the witness may be thus cross-examined by the party who called him are supported by the better reasons. *Schuster v. State*, 80 Wis. 107.

As late as 1892 the New York court of appeals restated its position in reference to leading questions and unanimously held, that the entire subject relating thereto in criminal prosecutions was within the discretion of the trial court. *People v. Sherman*, 133 N. Y. 349.

The matter of leading questions at any stage of the examination, is so far a matter of discretion that no legal exception will lie to any ruling thereupon. 2 Phil. Ev. 892, *et seq.*; *Sheldon v. Wood*, 2 Bosw. 267.

The English rule on cross-examination is that, when a witness has been introduced, sworn and examined as to any material point in the case, the other party may cross-examine him as to the whole case, including any new matter of defense; but the extent to which he may be allowed to press the witness with leading questions will depend upon the circumstances of the case, the demeanor of the witness, his apparent bias and other considerations, and must, to a great extent, be left to the sound discretion of the trial judge. This rule is adopted by several of the American state courts. 1 Thomp. Trials, § 430, citing 2 Phil. Ev. 896-911; *Morgan v. Brydges*, 2 Stark. 314; *Rex v. Brooke*, 2 Stark. 472; *Webster v. Lee*, 5 Mass. 335; *Merrill v. Berkshire*, 11 Pick. 269; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Blackington v. Johnson*, 126 Mass. 21; *Beal v. Nichols*, 2 Gray, 262; *Varick v. Jackson*, 2 Wend. 166, 19 Am. Dec. 571; *Fulton v. Stafford*, 2 Wend. 483; *Linsley v. Lovely*, 26 Vt. 123; *Legg v. Drake*, 1 Ohio St. 286; *Page v. Kankey*, 6 Mo. 433; *Brown v. Burrus*, 8 Mo. 26; *St. Louis & I. M. R. Co. v. Silver*, 56 Mo. 265; *State v. Sayres*, 58 Mo. 585; *Knapp v. Schneider*, 24 Wis. 70; *Durnford v. Clark*, 1 Mart. O. S. 202; *Davidson v. DeLallande*, 12 La. Ann. 826; *Nicholson v. Desobry*, 14 La. Ann. 81; *King v. At-*

kings, 33 La. Ann. 1057; *Kibler v. McIlwaine*, 16 S. C. 551; *Clinton v. McKenzie*, 5 Strobb. L. 36; *Kelly v. Brooks*, 25 Ala. 523; *Fralick v. Presley*, 29 Ala. 457, 65 Am. Dec. 413.

§ 217. **No Material Fact in Issue can be Assumed on Examination.**—It is no objection to the form of a question put to a witness that it assumes facts which are not disputed. The rules of law which govern in the examination of witnesses as effectually prohibit counsel from assuming, in their questions, any facts which are material to the point of inquiry, but which are to be ultimately found by the jury, as other rules of law forbid the presiding judge from assuming such facts in his instructions to the jury. In the former case the reason of such rules does not rest merely upon the consideration that such assumption of facts might mislead the witnesses, but upon the liability of such assumption or assertion of facts by counsel becoming a substitute in the minds of the jurors for evidence, and thus calculated to mislead them. In the latter case the reason is the same, with the further reason that the assumption by the court, in its instructions to the jury, of material facts to be found by them, is regarded as an invasion by the court of the peculiar province of the jury. The rules in the former case are so rigidly maintained that they will not permit counsel, even upon cross-examination and when leading questions may be put, to assume any material facts in issue and which are to be found by the jury, or to assume that particular answers have been given contrary to the fact. *Haish v. Munday*, 12 Ill. App. 539.

§ 218. **Nature and Scope of the Rebuttal Evidence in Criminal Cases.**—The rule is well settled that in rebuttal the people are restricted to evidence controverting the facts proven by the evidence of the defense; and that no evidence confirmatory of the original case can be introduced by way of rebuttal, even though it clearly establishes the prisoner's guilt. *McLeod's Trial*, pamph. p. 222; *Rex v. Hilditch*, 5 Car. & P. 299; *Rex v. Stimpson*, 2 Car. & P. 415; *Brown v. Giles*, 1 Car. & P. 118, 2 Phil. Ev. note 500.

The cases seemingly *contra* (*Rex v. Voke*, Russ. & R. 531; *Roscoe*, Crim. Ev. (6 Am. ed.) 88) have been overruled by later cases, and the recent rule now well settled is, where two offenses of a different grade of felony have been committed by a prisoner who stands charged only with the commission of the latter and greater, the

evidence must be restricted to proof of the last offense. Proof of any one crime cannot be introduced to support the charge of another. *Reg. v. Oddy*, 2 Den. C. C. 268, 273; *Barton v. State*, 18 Ohio, 221; *Cole v. Com.* 5 Gratt. 696; *Com. v. Call*, 21 Pick. 515; *Baker v. State*, 4 Ark. 56; *Dunn v. State*, 2 Ark. 229; *Rex v. Whiley*, 2 Leach, C. C. 983; *LaBeau v. People*, 34 N. Y. 223; *Friery v. People*, 2 Keyes, 424.

No rule for the conduct of a trial is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes. *Hastings v. Palmer*, 20 Wend. 225. He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard. *Ford v. Niles*, 1 Hill, 301; *Rex v. Stimpson*, 2 Car. & P. 415. He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. *Silverman v. Foreman*, 3 E. D. Smith, 322; *Rex v. Stimpson*, *supra*. These rules may, in special cases, be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception. *Marshall v. Davies*, 78 N. Y. 414.

"I must say that so much averse am I to withholding testimony, that I can hardly conceive of a case so gross and palpable that I should feel constrained to control the discretion of the circuit judge from receiving at any time additional affirmatory, cumulative and corroborative evidence of facts previously proved, or which tends to strengthen and add force or probability to such evidence." Lumpkin, *J.*, in *Walker v. Walker*, 14 Ga. 242, 250.

So largely is the admission or exclusion of evidence not strictly in rebuttal a discretionary matter with the court that we are justified in formulating a general rule to the effect that material testimony in a case should be admitted at any time, before the formal submission of the case to the consideration of the jury. The presiding judge in the exercise of this discretion has absolute immunity from all review unless it should clearly appear that there was a willful abuse of the discretion confided to him. Of course where important testimony is withheld with the obvious purpose of placing either party to a disadvantage the trial court

would be abundantly justified in refusing it admission. *Gaines v. Com.* 50 Pa. 319; *Dozier v. Jerman*, 30 Mo. 216, 220; *Huntsman v. Nichols*, 116 Mass. 521; *Morse v. Potter*, 4 Gray, 292; *Marshall v. Davies*, 58 How. Pr. 231.

The language of the New York court of appeals is a practical reaffirmance of the last paragraph. "The extent of the cross-examination upon matters immaterial to the issue, is in the discretion of the judge. Inquiries on irrelevant topics to discredit the witness, and to what extent this may be pursued—are matters committed to the sound discretion of the trial court; and this is the rule as regards the right of inquiry into all matters wholly collateral and immaterial to the issue. The court may permit disparaging inquiries on matters irrelevant to the issue, where the ends of justice demand it, and may exclude them without infringing upon any legal right of the parties; and the exercise of this discretion is not the subject of review, except in cases of plain abuse and injustice." *La Beau v. People*, 34 N. Y. 230.

Any evidence in rebuttal that could be fairly considered admissible in a civil action is equally competent in a criminal case.

This does not imply that a party is at liberty to swell the volume of his former testimony, but rather that he must meet the evidence afforded by new matter; by evidence not already in the case that will have a tendency to neutralize the effect of the adversary's proof. As a rule any evidence that rebuts either the main issue or any minor inquiry, is pertinent. *Com. v. Tinkham*, 14 Gray, 12; *Atkins v. State*, 16 Ark. 568; *Spivey v. State*, 26 Ala. 90; *Lightfoot v. People*, 16 Mich. 507; *Coleman v. People*, 55 N. Y. 81; *State v. Shermer*, 55 Mo. 83; *Reid v. State*, 50 Ga. 556; *People v. Austin*, 1 Park. Crim. Rep. 154; *Crawford v. State*, 12 Ga. 142.

The rule exemplified by the authorities is this: that whenever the existence of a purpose, or state of mind, is the subject of inquiry, explanatory conduct and accompanying expressions of the party himself, or of other persons to him or in his presence, may be shown by proof. Thus, in the case of *Hunter v. State*, 40 N. J. L. 495, it was declared by the court of errors that the declarations of a third party explanatory of an act that was part of the *res gestæ* were not hearsay but were legitimate evidence.

In the recent case of *People v. Dowling*, 84 N. Y. 478, which was a prosecution for receiving stolen goods, after the state had proved the receipt of the goods, the defendant, in order to rebut

the inference of guilty knowledge on his part, offered to show what statement the thief had made to him at the time he purchased the property, with respect to the source from which he had got it; and such statements were held competent evidence by the court of appeals.

An application of the same principle appears in the case of *Rex v. Whitehead*, 1 Car. & P. 67, and reference to other like cases will be found in the text-books.

§ 219. **The Cross-examination.**—The privilege of cross-examination is limited only to the discretion of the judge. Peake in his treatise on Evidence, says: "It is impossible to lay down a rule on this subject applicable to all cases, and therefore it must be left wholly to the discretion of the judge, who, in general, is guided by the demeanor of the witness, and the situation he stands in, with relation to the parties." (pp. 189, 190). Pothier, in his treatise on Obligations says: "The cross-examination of witnesses adduced by the opposite party, is a subject of the utmost nicety, with respect both to the conduct of the advocate and the discrimination of those who are to form a judgment. . . . The abuse to which this procedure is liable are the subject of very frequent complaint, but it would be absolutely impossible, by any but general rules, to apply a preventive to these abuses, without destroying the liberty upon which the benefits (above adverted to) essentially depend; and all that can be effected by the interposition of the court, is a discouragement of any virulence towards the witness, which is not justified by the nature of the cause. . . . Whatever can elicit the actual dispositions of the witness with respect to the event, whatever can detect the operation of a concerted plan of testimony, or bring into light the incidental facts and circumstances that the witness may be supposed to have suppressed; in short, whatever may be expected fairly to promote the real manifestation of the merits of the cause is not only justifiable, but meritorious." Vol. 2, pp. 228, 229.

So, as a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character. *People v. Brown*, 72 N. Y. 571; *Ryan v. People*, 79 N. Y. 594; *People v. Crapo*, 76 N. Y. 290, 32 Am. Rep. 302. If this limitation is not disregarded we can

only interfere where there has been an abuse of discretion. *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127; *LaBeau v. People*, 34 N. Y. 230; *People v. Casey*, 72 N. Y. 393; *People v. Oyer & Terminer Ct.* 83 N. Y. 436.

The opposite party may cross-examine the witness to any facts stated in his direct examination, or connected therewith, and in so doing may put leading questions, but if he examines him as to other matters, such examination is to be subject to the same rules as a direct examination.

And the court may in all instances, limit the time allowed for the cross-examination of witnesses (*Lynch v. State*, 9 Ind. 541), or the number of witnesses on either side. *Mergentheim v. State*, 107 Ind. 567. So, too, the court may at all times interpose its authority to regulate the manner and substance of the examination, to prevent the intimidation of witnesses or the evasiveness of their replies or any matters legitimately within the scope redirect, cross or otherwise. *State v. Scott*, 80 N. C. 365.

a. Rule as to Hostile Witnesses.—Where it appears that a witness is hostile to the party calling him or is reluctant and evasive in his replies, leading questions although generally excluded may be allowed. This too is a matter largely within the sphere of the court's discretion. *Klock v. State*, 60 Wis. 574. In the language of a well known writer, "the judge may, in his discretion, allow leading questions to be put, on direct or redirect examination; where the witness is hostile or reluctant, or is in the interest of the other party, or so youthful, ignorant, or infirm as to require the attention to be led; or where his memory has been exhausted without stating some particular, such as a name, which cannot be significantly pointed out by a general inquiry." Abbott, Trial Brief, 95.

Instances frequently arise, particularly on the part of the prosecution, where the witness is evidently reluctant and the state's attorney is burdened with his presence chiefly because he may have been the only eyewitness of the alleged offense. In such cases the trial court should regard the witness as hostile and indulge the utmost latitude in his examination. It is quite time that it was understood that the criminal classes of this country are not to be emancipated from all the effects of their vicious courses merely because one of their own ilk is a witness for the state and as such attempts by evasion and subterfuge to further

their own interests by placing a stumbling block in the path of the state's attorney. The wide discretion accorded the trial court in the matter of the cross-examination of witnesses will correct any tendency to jeopardize the people's case.

It is competent to ask a witness on cross-examination, whether he has been in jail or state prison, and how much of his life he has passed in such places, with a view to impair his credibility. The extent of such cross-examination rests somewhat in the discretion of the court, but the discretion should be liberally exercised. *Real v. People*, 42 N. Y. 270.

b. Confined to Relevant Facts.—A witness cannot be asked, upon cross-examination, questions which are not in any way relevant to the matters in issue; neither is a question allowed to be asked which, if answered affirmatively, would be wholly irrelevant to the issue; for the purpose of discrediting the witness if he answers in the negative, by calling other witnesses to disprove what he says; but this subject will perhaps be more conveniently discussed in a subsequent section.

Counsel upon cross-examination cannot assume that the witness has made an assertion in his examination in chief, which was not in fact made, or put a question which assumes a fact not in proof. Russell, Crimes, chap. 5, § 2.

In *Wentworth v. Buhler*, 3 E. D. Smith, 309, a point was made that the witness, on cross-examination, had been asked irrelevant questions. Woodruff, *J.*, says: "True, the evidence was not relevant to the issue, but there is no test for a cross-examination, if it was relevant to the credibility of the witness or any collateral matter opened by the adverse party. The latitude given to cross-examination is such, moreover, that we must be fully satisfied that injustice is caused by it, before we would reverse a judgment because on cross-examination a purely irrelevant question was allowed." See *Plato v. Kelly*, 16 Abb. Pr. 188; *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127; *Hardy v. Norton*, 66 Barb. 527.

The examination, both direct and cross, must be confined to facts relevant to the issue, but in cross-examination the witness need not be confined entirely to the facts to which he testified to the chief, and in the re-direct examination, he is only allowed to explain such matters as were first elicited upon the cross-examination. It is hardly necessary to state that where new matter is by

express sanction of the court introduced after the direct examination by either party, the opposite party is privileged to cross-examine upon the subject of the new matter.

c. When Party Makes Witness his Own.—By going into a new matter not involved in the direct examination, the party cross-examining, makes the witness his own so far as concerns his response to the questions regarding that matter. *Houghton v. Jones*, 68 U. S. 1 Wall. 702, 17 L. ed. 503; *Hughes v. Westmoreland Coal Co.* 104 Pa. 207; *Donnelly v. State*, 26 N. J. L. 463, 601; *Aurora v. Cobb*, 21 Ind. 492; *Hurlbut v. Meeker*, 104 Ill. 541; *Austin v. State*, 14 Ark. 555; *People v. Miller*, 33 Cal. 99; *State v. Smith*, 49 Conn. 376; *State v. Swayze*, 30 La. Ann. 1323.

d. Rule as to Collateral Matters.—Where collateral matter has been introduced into the cause by the party whose witness is on the stand in the testimony in chief—evidence not exactly pertinent to the issue on trial—whether the other side is bound to treat that as his own collateral matter, as the collateral matter of the cross-examining party. The cross-examiner may ask questions which are collateral, and may do this very extensively, but he must take the answer of the witness as true. If he is not satisfied with the answer, nevertheless he is bound by it, because he has chosen to ask the question that really does not belong to the case. But where the party whose witness is on the stand introduces collateral matter, and his witness, I will presume, testifies falsely in regard to that collateral matter, whether the other side may not contradict that witness in regard to that collateral matter, is another question. *Wylie, Justice*, in *United States v. Dorsey*, *Star Route Trial*, p. 3832.

Digesting the statement of the court with reference to this matter, it appears that answers to questions regarding side issues or collateral matters are not open to contradiction; but where such matters are brought out by the examination in chief, the cross-examiner may endeavor to contradict him.

It should be remembered that ordinarily a witness can testify only to those facts which he knows of his own knowledge except in those cases in which his opinion or the declaration or conduct of others is relevant.

When a witness is cross-examined, he may be asked any question which tends :

- (1) To test his accuracy, veracity, or credibility; or

(2) To shake his credit, by injuring his character.

Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify.

In the case provided for in article 120, a witness cannot be compelled to answer such a question. Stephen, Dig. art. 129.

The rule, as stated in the books, that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony, does not, by any means, imply that a witness may be cross-examined, for such purpose, as to every fact which is relevant to the issue. The right of cross-examination, for such purpose, is limited to those matters which tend to contradict, discredit, vary, qualify, or explain the testimony given by the witness on direct examination. In the leading case of *Atty. Gen. v. Hitchcock*, 1 Exch. 91, the rule was stated as follows by Alderson, B.: "A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness's testimony, given on the trial of the issue; and if that question is so put to him and answered, the opposite party may then contradict him, and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness's testimony, and so removes it." The reported cases, so far as we are acquainted with them, are consistent with the rule, and the reason of it, stated by Baron Alderson.

If the cross-examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credit of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the trial court that in the absence of a claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or the court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection.

When the answer would tend to criminate the witness, but would be collateral and irrelevant to the issue, and yet would affect his credibility, if he do not claim his privilege, no distinction, so far as the discretion of the court and the right of a party to call for its exercise by an objection are concerned, can be perceived between such a case and one differing from it in only that the answer would merely disgrace the witness. In short, where the question relates to a particular act which is collateral and irrelevant to the issue, it is proper for a party to object, and it is within the sound discretion of the court, where the witness does not exercise a privilege to decline, to permit an answer, if, by affecting the credibility of the witness, it will subserve justice, or to sustain the objection, if such purpose will not be promoted by the answer; and if the answer would not affect the credibility of the witness, the court should sustain the objection, and has no discretion to admit the evidence. See *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127; *Shepard v. Parker*, 36 N. Y. 517; *South Bend v. Hardy*, 98 Ind. 577.

e. Duty of the Court to Protect the Witness.—Zeal in a prosecuting attorney is entitled to the highest commendation, but that zeal must be exercised within proper limits. In civil cases counsel often take too much latitude in the cross-examination of witnesses. Witnesses are entitled to respectful consideration, and it is the duty of courts to see that they are protected from the insinuations and attacks of counsel, whether the insinuation or attack is direct or is in the form of a suggestive question. In criminal cases the prosecuting attorney is a public officer, acting in a quasi judicial capacity. Juries very properly regard him as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the defendant. *People v. Cahoon*, 88 Mich. 456.

In *Rickabus v. Gott*, 51 Mich. 227, the court held that "the duty of the trial judge to repress needless scandal and gratuitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully." See also, as bearing upon this question, *Bond v. Pontiac, O. & P. A. R. Co.* 62 Mich. 643; *Cronkhite v. Dickerson*, 51 Mich. 178; *Wheeler v. Wallace*, 53 Mich. 356; *People v. Hare*, 57 Mich. 506. These cases also impose the duty on the judge to protect every witness from irrel-

evant, insulting or improper questions, and from harsh or insulting treatment; and a witness shall be detained only so long as the interests of justice require.

f. Cross-examination During Absence of the Accused.—

Generally, it may be said that the continuance of a cross-examination of the people's witnesses during the brief absence of the prisoner on the trial is not a violation of the statutory provision that no person can be tried for a felony "unless he be personally present during such trial." *People v. Bragle*, 88 N. Y. 585, 42 Am. Rep. 269. *Maurer v. People*, 43 N. Y. 1, does not state a *contra* view, as in that case the absence was of some length and effected a substantial right of the accused.

g. Recalling Witness.—Whenever any witness has been examined in chief, the opposite party has a right to cross-examine him, and after the cross-examination is concluded the party who called the witness has a right to re-examine him. The court may, in all cases, permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively. Stephen, Dig. art. 126; *Cummings v. Taylor*, 24 Minn. 429; *Com. v. McGorty*, 114 Mass. 299; *Continental Ins. Co. v. Delpeuch*, 82 Pa. 225.

It is within the discretion of the judge at the trial, to permit a witness to be recalled to a fact in respect to which he had before testified, and to explain, qualify or contradict his former statements, and the discrepancy in the statements only affects his credibility. A court of review cannot revise or reverse the decision of the judge at the trial, in a matter properly resting in his discretion. *Wright v. Willcox*, 9 C. B. 650; *People v. Cook*, 8 N. Y. 67; *Williams v. Sargeant*, 46 N. Y. 482.

A witness once examined cannot be re-examined as to the same matter without leave of the court. But he may be re-examined as to any new matter, upon which he has been examined by the adverse party. After the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. This is purely a discretionary matter and never a fit subject of review unless for gross abuse of the discretion.

Under obvious principles of justice the trial court should allow, in all cases, civil or criminal, a witness to explain an error or inadvertence in his testimony when he requests to do so before leav-

ing the stand; and it is within the discretion of the court to recall him for that purpose. *Oberfelder v. Kavanaugh*, 21 Neb. 483.

h. Views of Sir James Stephen.—Stephen, in his *Digest of the Law of Evidence*, expounds the law as follows:

“When a witness is cross-examined he may be asked any question which tends: 1. To test his accuracy, veracity, or credibility; or 2. To shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120, namely, where the answer might expose him to a criminal charge or penalty.” Art. 129.

By placing such inquiries within the sound discretion of the court, the past lives of witnesses are not liable to be ransacked and exposed; for against such unreasonable and oppressive cross-examinations the power of the court may be interposed, on its own motion, to protect the witness and prohibit such questions. In the liberality allowed on cross-examinations, to promote the ends of justice, a sound discretion will never sanction inquiries the sole purpose of which is to disgrace the witness, and not to test his credibility. And whenever such is the object of it, it is the duty of the court to disallow it, and to confine the cross-examination to proper limits. It will be seen, therefore, that the abuse of such a cross-examination is guarded against: 1. By the privilege of the witness to decline to answer any question which may disgrace him, or may tend to charge him as a criminal; and 2. By the power of the court to interpose and to protect the witness, of its own motion. *State v. Bacon*, 13 Or. 143.

i. Cause for Remembering Certain Facts.—A witness is at liberty to state certain collateral facts that tend to fix some other fact about which he is being questioned in his memory, and it frequently occurs in all examinations that the fact of having had a conversation concerning a certain matter is one of the surest methods of remembering the subject-matter called for.

It is always competent for a witness to state that he had a conversation with a third person on a certain subject germane to the issue in dispute, and at a time specified, as a reason for his accurate recollection of the fact to which he has testified. The rules of evidence are those of common sense and human experience; and both of these teach us that the retentiveness of a witness's memory

as to a particular fact or indictment, is greatly improved where, after seeing or hearing of it, he subsequently converses about it. *Adams v. Robinson*, 65 Ala. 587.

j. The English Rule.—Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.

The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is “adverse” (*i. e.* hostile) to the party by whom he was called, and permits the question. Stephen, Dig. art. 131.

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him, except in the following cases:

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted. Stephen, Dig. art. 130.

§ 220. Importance of Cross-examination.—The importance and value of a cross-examination is truly and forcibly stated by Mr. Starkie in his work on Evidence, vol. 1, page 25. He says: “The power given to a party against whom evidence is offered, of cross-examining the witness upon whose authority the evidence depends, constitutes a strong test both of the ability and the willingness of the witness to declare the truth. By this means the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized.” Every person who has been engaged in the trial of causes in courts of

justice, indeed every one who has given any attention to the trial of causes, has seen how efficacious a cross-examination is, in eliciting truth, in separating hearsay from knowledge, and in defeating the most carefully prepared schemes of perjury and fraud. A right so valuable to parties should not be taken away or impaired. On the contrary, it should be held sound and guarded against all attempts, open or covert, to limit or restrict it. Like most other rights of litigants, it may be waived or lost by laches. But to deprive a party of it, the waiver or the laches must be clearly shown. It will not do to refuse a party the right of cross-examination upon doubtful evidence of an intention on his part to waive or surrender it. *Cole v. People*, 2 Lans. 370.

"Cross-examination," says Christiancy, *Ch. J.*, "is the greatest test of knowledge, as well as the veracity of the witness. The right to pursue it may sometimes be abused; and when it is sought to be abused,—as when counsel insists upon going over the same ground again and again, or where it is apparent that the witness has already fully answered without any appearance of evasion, and it is evident the counsel is merely pushing the witness for the sake of annoyance, or for any illegitimate purpose,—it is competent for the court, in its discretion, to put an end to it."

The advantages of the *viva voce* examination are thus outlined by Sir John Coleridge: "The most careful note must often fail to convey the evidence fully in some of its most important elements, viz: those for which the open oral examination of the witness in presence of prisoner, judge and jury, is so justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied when given open or orally, by the ear and eye of those who receive it." *Reg. v. Bertrand*, L. R. 1 P. C. 535, 10 Cox, C. C. 625.

§ 221. **Extent of Cross-examination.**—It was ruled at an early day in the supreme court of Missouri that when one party introduced a witness and examined him, the adverse party could cross-examine the witness as to all matters involved in the case, no matter how formal or unimportant the examination in chief

may have been. *Page v. Kankey*, 6 Mo. 433; *St. Louis & I. M. R. Co. v. Silver*, 56 Mo. 266. The authorities are in conflict on this subject and may be found collated by Professor Greenleaf. 1 Greenl. Ev. § 445; *State v. Brady*, 87 Mo. 142.

And where a witness, cross-examined in part, without fault of the party who summoned him, disappears, so that his cross-examination cannot be completed, it is not the right of the cross-examining party to have the whole evidence stricken out. *Burden v. Pratt* (Sup. Ct. N. Y.) 1 Thomp. & C. 554, 8 Alb. L. J. 382.

Whether, when a party is once entitled to cross-examine a witness, his right continues through all the subsequent stages of the cause, so that if the party should afterwards recall the same witness, to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been held.

It is legitimate cross-examination to interrogate an opposing witness as to his relations to the parties and the litigation, his motives, interests, inclinations, and prejudices, his means of obtaining correct and certain knowledge of the facts to which he testifies, and the manner in which he has used those means. 1 Greenl. Ev. § 446. Such testimony is not collateral and irrelevant to the issue, and the party calling it out, if it be adverse to him, may contradict it by other testimony for the purpose of discrediting the witness. All this is quite rudimentary in the law of evidence. *Schuster v. State*, 80 Wis. 107.

From the necessity of the case, it is difficult, perhaps impossible to lay down any precise or definite rule fixing the limits of such cross-examination. Necessarily, it must be left to the sound discretion of the trial court, subject only to review for its abuse.

The limit of cross-examination of ordinary witnesses is not marked with any great accuracy or distinctness. Questions are frequently allowed which strictly do not refer to matters about which the witnesses testified in chief. Great latitude is given trial courts in passing upon the admissibility of such questions; and their discretion is rarely interfered with by appellate courts.

It must be remembered that the privilege given a defendant in a criminal case to testify for himself is by no means an unmixed blessing. There are cases where an innocent defendant could do

himself no good, and might do himself harm, by going on the witness stand. But his refusal to do so will be construed to his injury by the average jurymen, in spite of any instruction the court may give on the subject. And then, if he does testify, his temptation to commit perjury will be considered so great that he will rarely be credited with telling the truth. But if he cannot go upon the stand for the mere purpose of stating a fact which will explain some suspicious circumstance, without being forced, upon cross-examination, to lay bare the whole history of his life, he had better keep away from it,—unless, indeed, instead of having a human character, he is a miraculous bundle of virtues, with no vice, and with nothing which men call a vice. *People v. Meyer*, 75 Cal. 383.

In *Prince v. Samo*, 7 Ad. & El. 627, the court says that a witness of the plaintiff cross-examined as to declarations of the plaintiff in a particular conversation cannot be re-examined as to unconnected assertions of the plaintiff in the same conversation, although connected with the subject of the suit. It must not, therefore, be assumed that cross-examination in part of a conversation necessarily lets in proof of the whole of it. This case qualifies the language of the court in *The Queen's Case*, 2 Brod. & B. 297, where Abbott, *Ch. J.*, says: "I think the counsel has a right on re-examination to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful, and also of the motive by which the witness was induced to use these expressions; but he has no right to go further and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. I distinguish," he says, "between a conversation with a party to a suit, criminal or civil, and a conversation with a third person." See *State v. Geddicke*, 43 N. J. L. 86.

The formula we deduce from a critical examination of the best considered decisions is substantially this: upon the cross-examination it is discretionary with the trial court to allow inquiries into collateral matters which have a tendency to affect the credibility of a witness, provided, however, that the responses of the witness are conclusive and are not subject to contradiction; again the prevailing view in most jurisdictions restricts the cross-examination to such matters as were elicited upon the examination in chief and

should not wander beyond this. Here, however, we encounter the discretion of the court which will exercise a salutary influence upon any hardships the rule might otherwise impose in special instances. *State v. Turner*, 76 Mo. 350; *State v. Saunders*, 14 Or. 300; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. McLaughlin*, 76 Mo. 320; *State v. Douglass*, 81 Mo. 231; *State v. Chamberlain*, 89 Mo. 129; *State v. Lurch*, 12 Or. 99; *State v. Porter*, 75 Mo. 171.

The Federal courts adopt the rule that the cross-examination must be limited to the matters touched upon in the direct examination, and where it becomes expedient to elicit other evidence the witness may be recalled at a subsequent stage of the trial. The party so recalling a witness makes such witness his own. This rule obtains in Pennsylvania, Indiana, Iowa, Illinois, Nebraska, and some other states. In New York the wide discretion accorded the trial court as to the order of proof and the admission of evidence practically annihilates the restriction created by the rule, and this view of the matter is gradually extending. *United States v. Mullaney*, 32 Fed. Rep. 370.

§ 222. **When Answer is Conclusive.**—It is among the familiar incidents of a criminal prosecution that where the accused takes the stand as a witness in his own behalf, the state's attorney will seek to show the commission of previous offenses; and on his denial of their commission, it frequently happens that the prosecution seek to prove the untruthfulness of his statement by the introduction of evidence tending to establish the perpetration of the crime denied. Such evidence is wholly inadmissible. The principle which governs is this: The answers of a witness to questions which tend to discredit him are conclusive if such questions relate to collateral matters.

"Whether he participated in the commission of the other offense was not a material inquiry on the trial of this indictment. It was simply collateral, and the object of it was by cross-examination to show such preceding criminal conduct on the part of the defendant as would lead the jury to disbelieve the witness, or to reduce the effect they might otherwise be inclined to give to his testimony. When that course of cross-examination has been followed, the law does not permit the party adopting it to introduce further and independent evidence to prove that the denial of the witness was false. When that is the sole effect to be given to the evidence,

the party cross-examining the witness is concluded by his answer. The inquiry cannot be further extended by producing testimony of a contradictory nature. The rule upon this subject has frequently been made a matter of consideration by the courts, and it is now well established that to entitle the party interrogating the witness in this manner, by way of cross-examination, to introduce evidence to contradict his statements, the cross-examination must be directed to a material inquiry in the case, or to evidence establishing a hostile or unfriendly bias against the party in the mind of the witness. *Carpenter v. Ward*, 30 N. Y. 243; *Plato v. Reynolds*, 27 N. Y. 586; *First Baptist Church v. Brooklyn Fire Ins. Co.* 28 N. Y. 153; *Chapman v. Brooks*, 31 N. Y. 75; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Schultz v. Third Ave. R. Co.* 89 N. Y. 248.

If, however, the false answer is given with reference to a matter directly relevant to the issue, the cross-examiner is by no means concluded. See *Greenfield v. People*, 13 Hun, 242.

The conclusion reached in the celebrated Stokes case has never been impaired and it must be regarded as "settled law" that, where the defense introduce a witness who after giving material testimony in the case is cross-examined by the prosecution with a view to impair the credibility of her testimony and where upon such cross-examination she denies having stolen certain articles of personal property from her employers, it is error under the objection of the defendant to allow the prosecution to prove the false character of this denial. *Stokes v. People*, *supra*.

The principle of evidence dimly outlined in the Stokes case may in its full expansion be expressed as follows:

"When a witness on cross-examination has answered a question which is relevant only to test his accuracy or credibility, his answers to such question cannot be contradicted except in the following cases:

"(1) If he has been asked whether he has been convicted of a crime and does not admit it, evidence may be given of such conviction.

"(2) If he is asked a question tending to show that he has a feeling of enmity toward the party against whom he is called, and if he denies the fact about which he is asked, he may be contradicted by other witnesses."

§ 223. Cross-Examination of Defendant in His Own Behalf.

—Few contentions in the entire range of criminal jurisprudence

have been more vehemently discussed or critically considered than the one now under review. The pivotal concept in all prosecutions for crime, is to the effect that the state in its effort to fasten upon one of its citizens the stigma and the infamy of a felonious characteristic, must be fully prepared to satisfactorily prove the offense it alleges, without invading the constitutional prerogative of the accused which relieves him from the necessity of testifying. These constitutional safeguards are emphasized and given great prominence in the organic law of every state composing confederation; and this privilege is guaranteed him by such positive and unequivocal language, as we find embodied in the Federal Constitution. "No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself." Direct and positive, as this language seems, it has been a prolific source of legal agitation, and a vast amount of misconception still pervades the entire subject, notwithstanding the most vigorous attempts of the judicial mind to dispel the obscurity. The least reflection would seem to suggest at least the logical formula of the rule that should obtain. The state must prove the averments and implications of its indictment, and to achieve this result, it cannot rely upon the testimony of the party accused. But where, under the emergencies that confront the defendant, he for any reason deems it advantageous to take the stand as a witness in his own behalf, it is not a perversion of common sense and natural justice to say to the state's attorney, "the accused may swear to whatever will exculpate him, but you on cross-examination cannot deviate from the rule that confines your questionings to such as have been suggested by the examination in chief." Such a ruling as this offers a premium on crime and is a direct encouragement to gross perjury, while it refuses to harmonize with the first elements of natural justice. The accused renounces the privilege of silence by becoming a witness, and in placing himself upon the stand, he avowedly and by implication invites and challenges such questioning as may be pertinent to the issues involved—such scrutiny of his conduct as may be fairly deemed within the scope and nature of the indictment. Fortunately, these assumptions of the text are fully vindicated by the entire tenor and trend of modern adjudication.

People v. Tice, decided by the New York court of appeals in

June, 1892, reported in 15 L. R. A. 669, where it was made the occasion for an exhaustive explanatory note by James G. Green, Esq., of counsel in the case.

The note is here given in full, as furnishing by far the most satisfactory exposition of this subject anywhere published.

NOTE.—*Cross-examination of the defendant in criminal cases.*

Under statutory limitations.

Under a statute providing that when the accused offers "himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief," a defendant in a criminal case who, on his direct examination, has testified as to particular facts only cannot be cross-examined generally as a witness in the case. *People v. O'Brien*, 66 Cal. 602.

If the accused has answered questions on cross-examination without objection, which were without the range of his testimony in chief, he cannot escape answering a further question asked for the purpose of clearing up what he has already said, on the ground that it is foreign to his direct examination. *People v. Sutton*, 73 Cal. 243.

He may be examined about an *alias* and a conviction of felony for the purpose of discrediting his testimony, although not referred to in his direct examination. *People v. Meyer*, 75 Cal. 383; *McFarland and Patterson, JJ.*, record a vigorous dissent.

In *People v. Fong Ohing*, 78 Cal. 169, it was held that testimony in chief by the accused as to his birth, parentage, education and business opened the door wide enough to allow him to be asked on cross-examination whether he had ever been arrested before.

Under such statute a defendant who testifies that he did not commit the offense may be asked on cross-examination any question showing his testimony to be false, as whether he wrote a certain letter which contradicted his testimony. *People v. Rozelle*, 78 Cal. 84.

One on trial for stealing property which he testifies he purchased of a certain person, may be cross-examined as to the present whereabouts of the alleged vendor and the prisoner's efforts to procure his attendance at the trial. *People v. Cline*, 83 Cal. 374.

In Missouri it is provided by statute that the accused "shall be liable to cross-examination as to any matter referred to in his examination in chief" [Rev. Stat. § 1918], which is held to restrict the cross-examination to the matter referred to in the direct examination. *State v. Chamberlain*, 5 West. Rep. 386, 89 Mo. 129; *State v. Trott*, 36 Mo. App. 29; *State v. Patterson*, 3 West. Rep. 226, 88 Mo. 88; *State v. McLaughlin*, 76 Mo. 320; *State v. Porter*, 75 Mo. 171, 178; *State v. McGraw*, 74 Mo. 573; *State v. Turner*, 76 Mo. 350.

But it is not reversible error if the matters touched upon by the cross-examination which were outside the scope of the direct examination were unimportant and could not affect the verdict. *State v. Brooks*, 10 West. Rep. 679, 92 Mo. 542, 582; *State v. Beauleigh*, 10 West. Rep. 377, 92 Mo. 490; *State v. Douglass*, 81 Mo. 231.

The accused cannot be cross-examined as to previous convictions for crime. *State v. Brent*, 100 Mo. 531.

Objection must be made and exception saved in order to assign error on a

§ 224. Testimony of Witness since Deceased, Given on Former Trial.—The evidence of a witness, since deceased, on a question which passes the statutory limit of cross-examination. *State v. Mills*, 4 West. Rep. 406, 88 Mo. 417.

The defendant having denied having a cane at the time of an affray may be cross-examined as to his possession of a cane shortly prior thereto. *State v. McKinzie*, 102 Mo. 620.

In *State v. Owen*, 78 Mo. 367, 377, it was held proper to ask on cross-examination of the prisoner, "Is this all you are willing to tell the jury about this case?"

The Missouri statute restricting the cross-examination of the accused to the subject of the direct was passed subsequent to *State v. Clinton*, 67 Mo. 380, 28 Am. Rep. 506; *State v. Cox*, 67 Mo. 392; *State v. Testerman*, 68 Mo. 408, and *State v. Rugan*, 68 Mo. 214, which cases followed a different rule.

Under the Oregon statute, which provides that an "accused when offering his testimony as a witness in his own behalf shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal," he cannot be cross-examined as to irrelevant matters for the purpose of discrediting him. *State v. Saunders*, 14 Or. 300.

Thayer, *J.*, says, however, p. 309: "It is very likely that if the statute contained no limitation as to the extent of the cross-examination of a defendant in such a case, he would occupy the same footing of any other witness."

In *State v. Lurch*, 12 Or. 99, 103, it is said of the Oregon statute: "This does not compel him to be a witness against himself beyond such cross-examination. The humane principle of the law that the party shall not be compelled to be a witness against himself, is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he were to be called and made to testify at the instance of the state."

A similar limitation on the range of the cross-examination of a defendant in a criminal case is imposed by statute in Arizona and Louisiana.

In criminal cases the cross-examination of witnesses must be confined to the subject-matter of the direct or to that closely connected therewith. *State v. Wright*, 48 La. Ann. 589; *State v. Baker*, 43 La. Ann. 1168.

In Georgia the accused cannot become a witness on his own trial but may make an unsworn statement and may decline to answer any question on cross-examination. Ga. Code 1882 (Lester, R. & H. ed.) §§ 3854, 4637.

In absence of statutory limitation.

In general.

Whether the cross-examination must be confined to the range of the testimony in chief, or may extend to the matters in issue, is a question of state and not of federal law. *Ex parte Spies*, 123 U. S. 131, 31 L. ed. 80.

Judge Cooley in his work on Constitutional Limitations, p. 317, says: "These statutes (giving the accused the right to testify) cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses. If he does testify he is at liberty to stop at any

former trial of the same case, may be proven on a subsequent trial. His deposition then taken may be introduced either by the

point he chooses and it must be left to the jury to give a statement, which he declines to make a full one, such weight as under the circumstances they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself and the statutory privilege becomes a snare and a danger."

Under the former Michigan statute which allowed the prisoner to make an unsworn statement the cross-examination could not go beyond the statement. *People v. Thomas*, 9 Mich. 314, 321; *Gale v. People*, 26 Mich. 157.

But since the statute of 1881 he may be cross-examined like any other witness on matters outside of his testimony in chief. And this although he was not under oath, the right to make an unsworn statement having been taken away by the statute of 1881. *People v. Robinson*, 86 Mich. 415.

It is held in *Miller v. State*, 15 Fla. 577, that the statute allowing the accused to make a "statement of the matters of his or her defense, under oath, before the jury," does not render one making such statement subject to cross-examination.

Of the view taken by Judge Cooley it is said in *Clark v. Jones*, 87 Ala. 474, 479: "It may be that the learned author's mind was specially directed to the statute of Michigan [now repealed] which allowed the accused to make an unsworn statement, but subject to be cross-examined on such statement. If the observations apply to statutes which permit a defendant to become a witness sworn and examined as such, we cannot concur in a construction which authorizes the accused, after exercising his option, and while occupying the position of a witness, to disclose and to decline to disclose such facts as may, in his opinion, suit his convenience and interest, leaving his refusal to make full answers merely to be considered by the jury in weighing his evidence."

The general rule in jurisdictions where there is no statutory limitation is that an accused person testifying in his own behalf is to be cross-examined like any other witness. *Connors v. People*, 50 N. Y. 240; *People v. Howard*, 73 Mich. 10; *Boyle v. State*, 2 West. Rep. 788, 105 Ind. 469; *Keyes v. State*, 122 Ind. 527; *State v. Pfefferle*, 36 Kan. 90; *Fralich v. People*, 65 Barb. 48; *Marr v. People*, 63 Barb. 618; *State v. Huff*, 11 Nev. 17; *McKeone v. People*, 6 Colo. 346; *Chambers v. People*, 105 Ill. 409, 413.

Whether the range of the cross-examination will be restricted to that of the direct will depend upon the rule of cross-examination of witnesses which prevails in each jurisdiction—that is whether the strict, so-called American rule is followed or the liberal English rule.

The rule that the cross-examination of any witness must be confined to the subject opened by the direct, does not, however, restrict it to the specific facts of the direct examination, "for, once a subject is entered upon, it is opened to a full and detailed examination on cross-examination." *Boyle v. State*, 2 West. Rep. 788, 105 Ind. 469.

In discussing the statute enabling an accused person to testify in his own behalf, Davis, *P. J.*, in *People v. Courtney*, 31 Hun, 199 (affirmed, 94 N. Y. 490) says, *obiter*, p. 202, that when "a person accused of crime elects to become a witness in his own behalf, he occupies the same position as any other witness

state or by the accused. Such proof does not violate defendant's constitutional right to "meet the witness face to face." And his

and may be fully examined in conformity to the established rules of evidence to contradict any testimony he may give, or to impeach or impair his own credibility, in the same manner as that of any other witness may be impaired."

In *Ruloff v. People*, 45 N. Y. 213, 221, although the exception was to comments by the trial judge on the failure of the defendant to take the stand in his own behalf, Allen, J., said: "If sworn, . . . he (the defendant) will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility and character, and under pretense of impeaching him as a witness, all the incidents of his life brought to bear with great force against him."

Cross-examination of an accused as to matters not touched by his direct examination is not compelling him "to be a witness against himself" within the constitutional prohibition. *McGarry v. People*, 2 Lans. 227.

The court said, p. 232: "He was not only a volunteer, but had taken the necessary oath to enable himself to testify, 'to tell the truth, the whole truth and nothing but the truth' upon the whole issue of traverse between himself and the people. He could not have been compelled to give evidence at all, but when he made himself a witness, . . . he waived the constitutional protection in his favor and subjected himself to the peril of being examined as to any and every matter pertinent to the issue." Reversed on another point without noticing the question arising on the defendant's cross-examination. *McGarry v. People*, 45 N. Y. 153.

The range and extent of cross-examination is within the discretion of the trial judge, subject to the limitation that it must relate to facts pertinent to the issue or which tend to discredit the witness or impeach his moral character. *People v. Court of Oyer & Terminer*, 83 N. Y. 436, 460; *People v. Clark*, 3 Cent. Rep. 801, 102 N. Y. 735; *People v. Hooghkerk*, 96 N. Y. 149, 163; *Territory v. O'Hare*, 1 N. D. 30.

When the accused testifies in his own behalf it is within the discretion of the trial court to allow cross-examination on the whole case, although not covered by the direct examination. *Disque v. State*, 6 Cent. Rep. 331, 49 N. J. L. 249.

An accused when a witness in his own behalf is subject to the same tests as are applied to other witnesses, i. e., to cross-examination as to any pertinent matter and impeachment by assailing his character or by proof of contradictory statements. *Clarke v. State*, 78 Ala. 474; on subsequent appeal, 87 Ala. 71; *Norris v. State*, 87 Ala. 85.

An accused person may be cross-examined the same as any other witness to lay the foundation for his impeachment. *State v. Red*, 53 Iowa, 69.

As to relevant matters.

A defendant in a criminal proceeding, who elects to testify in his own behalf, waives the constitutional protection against being compelled to give evidence against himself and is subject to cross-examination on all matters pertinent to the issue. *State v. Wentworth*, 65 Me. 234, 240, 20 Am. Rep. 688; *State v. Wilham*, 72 Me. 531; *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88; *State v. Cohn*, 9 Nev. 179; *Rains v. State*, 88 Ala. 91; *People v. Bussey*, 82 Mich. 49.

testimony then given may be proved, if necessary, by the testimony of one who was present and heard it, who may state its

Where an accused person as a witness for himself broadly denies the crime charged, the prosecutor may cross-examine him on any matter relevant and material to the issue. *Thomas v. State*, 1 West. Rep. 309, 103 Ind. 419; *Com. v. Clark*, 5 New Eng. Rep. 378, 145 Mass. 251.

State v. Clinton, 67 Mo. 380, decided prior to the limitation of the cross-examination of an accused by statute held him subject to cross-examination on any matter pertinent to the issue. So, too, *State v. Rugan*, 68 Mo. 214; *State v. Testerman*, 68 Mo. 408, and *State v. Cox*, 67 Mo. 392.

Cross-examination of an accused directed against the accuracy and truthfulness of his evidence in chief is proper. *People v. Hicks*, 79 Mich. 457, 463.

If the accused in a testimony in chief has given an account of his movements upon a day named, it is proper to go fully into the subject on cross-examination. *Boyle v. State*, 2 West. Rep. 788, 105 Ind. 469.

An accused person who undertakes to tell all that transpired within a certain time may be asked on cross-examination if a certain incident happened within that interval, although he has made no reference to it in his direct examination. *People v. Russell*, 46 Cal. 121, decided prior to the limitation of cross-examination by statute. See *supra*.

It is proper to ask one on trial for murder, whose plea was self-defense, whether he did not flee after the killing and whether he had been in jail or engaged in other altercation. *Baker v. Com.* (Ky.) Nov. 28, 1891.

One on trial for rape who has testified that he was not suffering from gonorrhœa at the time of the offense may properly be cross-examined as to his possession and use of certain bottles of medicine while in jail after his arrest. *People v. Glover*, 71 Mich. 303.

In *State v. Pritchett*, 106 N. C. 367, it was held proper cross-examination of one on trial for murder to ask what he played off crazy for, referring to his conduct at the time of his arraignment.

One indicted for murder, who has testified that he committed the homicide because of insulting words spoken concerning his wife, may properly be asked on cross-examination whether she is really his wife, and when and by whom they were married. *Watson v. Com.* (Va.) 15 Va. L. J. 379.

A defendant on trial for adultery having denied in his testimony in chief the commission of the offense at the time alleged, or at any other time, may be asked on cross-examination as to having pleaded guilty to such an offense in another state. *Com. v. Mosier*, 135 Pa. 221.

A defendant testifying in his own behalf is to be treated the same as any ordinary witness, and having put his character in issue may be cross-examined with a view of showing that it is different than represented by his witnesses. *State v. Merriman*, 34 S. C. 17.

A defendant who becomes a witness for himself may be asked about previous statements inconsistent with his testimony for the purpose of affecting his credibility. *Com. v. Tolliver*, 119 Mass. 312.

In this case Ames, J., said, p. 315: "By availing himself of the right to take the stand as a witness, the defendant became a general witness in the case, subject to the same tests of truthfulness and the same rules as to examination and cross-examination as are applicable to all other witnesses. Being sworn to tell

substance, if unable to repeat its words. But such testimony must be placed before the jury as nearly as possible as the de-

the truth, the whole truth and nothing but the truth, he waived all right to keep anything back, even in the case of questions, the answers to which would tend to criminate himself."

In *Com. v. Lannan*, 13 Allen, 563, Hoar, J., says: "The defendant, by offering himself as a witness, waives his right to object to any question pertinent to the issue, on the ground that the answer may tend to criminate him." This language is criticised as *obiter* and not justified by the facts of that case by a writer in 4 Crim. Law Mag. 335, who maintains that the question there allowed was proper on the ground that the direct examination had opened the way for it, and who also maintains that the true rule is that as to questions asked on the cross-examination which are entirely foreign to the testimony in chief, the accused when a witness is entitled to claim his privilege against self-crimination. p. 334.

A like criticism is made on similar language in *Com. v. Mullen*, 97 Mass. 545.

The cross-examination of a defendant in a criminal prosecution is neither limited to the range of the direct, nor can he refuse to answer questions criminating himself of the very offense for which he is being tried. *State v. Allen*, 107 N. C. 805.

In *Spies v. People*, (*The Anarchists' Case*), 10 West. Rep. 701, 122 Ill. 1, 235 it is said: "If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that, by so doing, he may criminate himself." So held in *Com. v. Morgan*, 107 Mass. 199.

An accused who testifies in his own behalf and denies the commission of the offense at the place charged may be asked on cross-examination whether he has committed the offense charged elsewhere, and he will not be excused from answering on the ground that his answer would criminate himself. *Com. v. Nichols*, 114 Mass. 285; *State v. Klitzke*, 46 Minn. 343.

A witness who consents to testify to any matter tending to criminate himself must tell all relating thereto. *State v. Fay*, 43 Iowa, 651; *State v. Nichols*, 29 Miss. 357.

"As to any fact or circumstance relevant to the issue, or which sheds light upon the commission and character of the offense, though inculpatory, he waives his constitutional right to protection against being compelled to give evidence against himself. But the waiver extends no farther than to all such facts and circumstances as may tend to illustrate the particular offense charged." *Clarke v. State*, 78 Ala. 474, 480; *Cotton v. State*, 87 Ala. 103; *Clarke v. State*, 87 Ala. 71; *Norris v. State*, 87 Ala. 85.

"Within these limits, the fullest cross-examination should be allowed; but its range into inquiries respecting past transactions and offenses, separate and distinct, is prohibited by the constitutional inhibition." *Clarke v. State*, *supra*; *Smith v. State*, 79 Ala., 21; *Clarke v. State*, and *Norris v. State*, *supra*.

As to irrelevant matters.

An accused person testifying in his own behalf is subject to the same cross-examination as any other witness, the range of which on irrelevant matters rests in the sound discretion of the trial court. *Hanoff v. State*, 37 Ohio St. 178; *Yanke v. State*, 51 Wis. 464.

ceased witness would have placed it, if living and present. The fact that a witness on such previous trial, who is still living, is

The extent to which a defendant may be cross-examined as to his previous residence and history is largely in the discretion of the trial court. *State v. Romain*, 44 Kan. 719.

The extent of the cross-examination of an accused directed against his credibility is within the discretion of the trial court. *Cowley v. People*, 8 Abb. N. C. 1, 34, affirmed, 83 N. Y. 464, 38 Am. Rep. 464, without noticing this point.

Earl, J., in *People v. Casey*, 72 N. Y. 394, 398, says: "When a prisoner offers himself as a witness in his own behalf, he is subject to the same rules upon cross-examination as any other witness. He may be asked questions disclosing his past life and conduct and thus impairing his credibility. Such questions may tend to show that he has been guilty of the same crime as that for which he is upon trial; but they are not on that account incompetent. When he offers himself as a witness, and he seeks to take the benefit of the statute which authorizes him to testify in his own behalf, he takes the hazard of such questions. He must determine, before he offers himself, whether his examination will benefit or injure him. The extent to which such an examination may go to test the witness's credibility is largely in the discretion of the trial court."

The questions which were asked the defendant in this case were as to other altercations and assaults than that for which he was on trial.

This case is followed in *People v. Irving*, 95 N. Y. 541.

An accused may be asked on cross-examination whether he has not been suspended from his office as an attorney and counselor, it being a specific fact having a tendency to affect his credit as a witness. *People v. Reavey*, 38 Hun, 418.

It is proper to cross-examine an accused person, for the purpose of impeaching his credibility, as to his possession of certain articles that would connect him with nefarious occupation, such as counterfeiting. *People v. Giblin*, 4 L. R. A. 757, 115 N. Y. 196.

One on trial for violating the law against selling lottery tickets may be asked on cross-examination whether for several years he had been engaged in the business of selling lottery tickets. *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

One on trial for seduction may be asked on cross-examination, for the purpose of affecting his credibility, as to having sexual intercourse with women other than the prosecutrix. *People v. Eckert*, 2 N. Y. Crim. Rep. 470, 481.

It is error to allow cross-examination of an accused person as to conduct which could serve no purpose except to prejudice him before the jury. *Gifford v. People*, 87 Ill. 210; *Hayward v. People*, 96 Ill. 492, 503.

It was held error to allow one on trial for murder to be asked, on cross-examination, "Did you not belong to the Jesse James gang?" *Clarke v. State*, 78 Ala. 474, 481.

In *People v. Pinkerton*, 79 Mich. 110, it is said: "In a criminal case, we do not think it competent to compel a respondent who is a witness to answer questions, irrelevant to the issue, having a tendency to bring in other charges. Whatever latitude is proper in cross-examination to test veracity, it cannot

absent from the state, or beyond the territorial jurisdiction of the court, is not generally ground for the admission of his previous properly introduce independent issues, against the person who is both witness and respondent."

In *Connors v. People*, 50 N. Y. 240, it was claimed that the defendant testifying in his own behalf was protected from any cross-examination by the constitutional provision "that no man can be compelled to be a witness against himself."

This was held to be untenable as an objection to the question, "How many times have you been arrested?" Such a question is objectionable as incompetent to affect credibility and tending to degrade the witness and which he is privileged from answering. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183. But see *Brandon v. People*, 42 N. Y. 265; *People v. Bradt*, 46 Hun, 445.

In *People v. Brown*, *supra*, it was held improper to require an accused to answer on cross-examination how many times he had been arrested. Church, *Ch. J.*, said: "I am of the opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction for one offense by proof that the accused may have been guilty of others."

In *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302, a question to the defendant on cross-examination as to a previous arrest was held incompetent, although no claim of privilege was made. Church, *Ch. J.*, said, p. 290: "The discretion, which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility should be exercised with great caution, when an accused person is a witness on his own trial. . . . It is not legitimate to bolster up a weak case by probabilities based upon other transactions. An accused person is required to meet the specific charge made against him, and is not called upon to defend himself against every act of his life."

Requiring a defendant to answer on cross-examination as to a previous arrest on a charge of which it appears he was acquitted is harmless. *People v. Ogle*, 7 Cent. Rep. 49, 104 N. Y. 511.

An accused person testifying in his own behalf may be discredited like any other witness by cross-examination as to other criminal accusations. *State v. Thomas*, 98 N. C. 599.

It is not competent to prove by cross-examination other crimes than that with which he is charged. *State v. Carson*, 66 Me. 116.

The court said, p. 117: "He cannot be required to be prepared to vindicate himself against any alleged crime which may be insinuated in the form of cross-examination, and of which he has no previous notice."

It is error to cross-examine an accused as to the commission of other offenses than that for which he is on trial, although of the same kind. *Bailey v. State*, 67 Miss. 333.

It is improper to cross-examine a defendant as to previous arrests for the purpose of impeaching his credibility under a statute allowing witnesses to be interrogated as to convictions of offenses. *People v. Hamblin*, 68 Cal. 101.

He may be asked whether he has been convicted of other offenses, if any witness might be so interrogated. *State v. Lawhorn*, 88 N. C. 634; *People v.*

testimony, unless his absence is occasioned by the defendant. *Rapalje*, Crim. Proc. § 278, citing *Green v. State*, 38 Ark. 304; *Johnson v. State*, 1 Tex. App. 333; *Black v. State*, 1 Tex. App. 368; *Hair v. State*, 16 Neb. 601; *People v. Murphy*, 45 Cal. 137; *Greenwood v. State*, 35 Tex. 587; *Pope v. State*, 22 Ark. 372; *State v. Cook*, 23 La. Ann. 347; *Kean v. Com.* 10 Bush, 190; *Pound v. State*, 43 Ga. 88; *Avery v. State*, 10 Tex. App. 199; *Simms v. State*, 10 Tex. App. 131; *People v. Sligh*, 48 Mich. 54; *Collins v. Com.* 12 Bush, 271; *Owens v. State*, 63 Miss. 450; *United States v. Reynolds*, 1 Utah, 319.

The main objection urged to the admissibility of such testimony is, that, in a criminal prosecution, the defendant generally has the right to be confronted by his witnesses, and secondary evidence of what an absent witness swore to on a former prosecution is not admissible, unless it is clearly proved that he had permanently removed from the state. Where the witness is deceased, the authorities hold, in uniform accord, that his testimony

Johnson, 57 Cal. 571; *People v. Hovey*, 29 Hun, 382, affirmed, 92 N. Y. 554, without noticing this point; *State v. Curtis*, 39 Minn. 357; *Com. v. Sullivan*, 150 Mass. 315; *State v. Probasco Co.* 46 Kan. 310; *Mitchell v. Com.* (Ky.) 12 Ky. L. Rep. 458; *Com. v. Bonner*, 97 Mass. 587.

As to communications with counsel.

An accused person testifying in his own behalf cannot be required on cross-examination to disclose communications between himself and his attorney to to which no reference was made in his testimony in chief. *State v. White*, 19 Kan. 444, 27 Am. Rep. 137; *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362.

A party testifying in his own behalf cannot be cross-examined as to statements made by him in consultation with his attorney. *Bigler v. Reyher*, 43 Ind. 112 (disapproving *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333); *Barker v. Kuhn*, 38 Iowa, 392; *Hemenway v. Smith*, 28 Vt. 701.

In *Woburn v. Henshaw*, 101 Mass. 193, 3 Am. Rep. 333 (a civil case), it was held that a party who is a witness for himself is liable to full cross-examination as to communications between himself and his attorney.

Re-cross-examination.

It seems to be proper to recall an accused person who has testified in his own behalf for the purpose of a re-cross-examination. *State v. Horne*, 9 Kan. 119. So held in *State v. Cohn*, 9 Nev. 179.

Interrogation by the court.

In *Gill v. People*, 3 Hun, 187 (affirmed, 60 N. Y. 643, without opinion) it is said: "Gill chose to take the stand as a witness upon his own behalf, and it then became perfectly proper, and indeed the duty of the court, to interrogate him as fully as might be needful to test the truth of his direct testimony."

upon a second trial is admissible. In *Horton v. State*, 53 Ala. 488, such testimony taken before a committing magistrate was admitted on a trial of the same cause in the circuit court, the witness being satisfactorily proved to be dead, following a like ruling in *Davis v. State*, 17 Ala. 354. The basis of the rule is the necessity of the case, to prevent the defeat of justice; the constitutional objection being obviated by the fact that the defendant has already had the opportunity to confront and cross-examine the witness, in the prior procedure involving the same issue. *Marler v. State*, 67 Ala. 55; *Summons v. State*, 5 Ohio St. 325. In *Marler v. State*, *supra*, the testimony given on the former trial by a witness who had since become insane, was allowed to be introduced in evidence, the necessity and reason of the case being regarded the same as if he were dead. The authorities are fully reviewed in that decision, and the true reason upon which they are based stated to be the necessity of preventing the miscarriage of justice; which applies with equal force to a witness who is shown to be absent from the state for an indefinite time, so that he cannot be reached by the process of the courts at the time of the trial. It is possible, it is true, that the absent witness may return at some day in the future, just as it is possible that an insane man may be restored to his reason; but the courts cannot be expected to delay the administration of justice, waiting for the happening of so indefinite a contingency.

The following language is used on this subject by Mr. Starkie: "It is an incontrovertible rule, that when the witness may be produced his deposition cannot be read, for it is not the best evidence. But the deposition of the witness may be read, not only when it appears that the witness is actually dead, but in all cases where he is dead for all purposes of evidence; as where diligent search has been made for him, and he cannot be found; where he resides in a place beyond the jurisdiction of the court; or where he has become a lunatic, or attainted." 1 Stark. Ev. *409, *410.

In *Long v. Davis*, 18 Ala. 801, such testimony of a non-resident witness was allowed in a civil case; and in many of the American states its admissibility has been confined to cases of this character. In England, the practice on this point, in criminal cases, does not seem to have been uniform, the general rule, however, being not to admit the deposition, or secondary evidence of any witness, while any reasonable hope remained that the witness would be able

to attend on some future occasion. 1 Stark. Ev. (Sharswood's ed.) 411, note Y. The more recent decisions in this country however, support the contrary view; and they seem to us to better comport with both reason and analogy, as well as to more efficiently promote the convenient administration of justice. It is the settled rule, that when the subscribing witness to an instrument is out of the state, his handwriting may be proved, whether in a civil or criminal proceeding.

The following authorities are directly in point on this question in criminal cases: *Sullivan v. State*, 6 Tex. App. 319; *People v. Devine*, 46 Cal. 45; *Shackleford v. State*, 33 Ark. 539; *Hurley v. State*, 29 Ark. 17. And the following in civil cases: *Magill v. Kauffman*, 4 Serg. & R. 317; *Howard v. Patrick*, 38 Mich. 795; *Carpenter v. Groff*, 5 Serg. & R. 162; *Long v. Davis*, 18 Ala. 801.

The reasoning and *dicta* in the following cases, of absent, deceased, insane and sick witnesses, support the same view: *Drayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Slusser v. Burlington*, 47 Iowa, 300; *Summons v. State*, 5 Ohio St. 325; *Marler v. State*, 67 Ala. 55; *Rex v. Hogg*, 6 Car. & P. 176; *Emig v. Diehl*, 76 Pa. 359; *Miller v. Russell*, 7 Mart. N. S. 266; *Lowe v. State*, 86 Ala. 47.

In *People v. Murphy*, 45 Cal. 137, it is distinctly held that a person who kept notes of the testimony of a deceased witness may read such notes to the jury as the testimony of the deceased witness. *Hair v. State*, 16 Neb. 601.

And the same ruling obtains in New Hampshire. "Any person who heard the respondent testify on a former hearing, may testify what he then stated for the purpose of contradicting his present story. Such impeaching testimony is not confined to such witnesses as took minutes of his former testimony." *State Archer*, 54 N. H. 465.

In cases where the witness was living, but had gone without the jurisdiction, the decisions have been very uniform that the testimony is not admissible.

In *Finn v. Com.* 5 Rand. (Va.) 701, it is said that proof of what a witness said upon a former trial is inadmissible in a criminal prosecution, especially where he has only removed out of the state. The same was held in New York, in the case of *People v.*

Newman, 5 Hill, 295. So also in *Brogy v. Com.* 10 Gratt. 722; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *State v. Houser*, 28 Mo. 233.

I have found no case where the testimony of a witness, absent but living, given at a former trial, has been allowed to be proved at a subsequent trial. There are cases where the testimony of the witness in the preliminary examination has been allowed to be proved, when the witness had died, but none where he had gone from the jurisdiction. And I think the law must be held to be that when the witness is living he must be produced, or his testimony cannot be received in criminal cases, even if he be beyond the jurisdiction of the court or all of the United States. The Constitution of the United States provides (Amendments, art. 6), that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, and this without exception. Not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions. And, if the accused has this right, it must be mutual, and exist on the part of the government. The trial would not be a fair one otherwise. Nor can it fairly be maintained that, if the witness has once been confronted with the accused, before the committing magistrate, that the requirements or guaranties of the constitution are answered.

It is little better than an evasion of the matter to say that if the witness has been present at the preliminary examination, when the real question is whether the accused shall be held for the action of the grand jury, that, therefore, when he is indicted, and life, liberty or property are at stake, the right no longer exists. As well might it be said that if, in the complaint before the magistrate, the accused was informed of the nature and cause of the accusation, the subsequent indictment need not state the accusation again. The fair meaning of the constitution is that wherever and whenever he is put on his final trial he shall be confronted with the witnesses against him, if they be alive. *United States v. Angell*, 11 Fed. Rep. 34.

“What a witness, since dead, has sworn upon a trial between the same parties may be given in evidence, either from the judge’s notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having

been given." Mansfield, *Ch. J.*, in *Doncaster v. Day*, 3 Taunt. 262. See also *Roberts v. State*, 68 Ala. 515; *State v. Able*, 65 Mo. 357; *People v. Brotherton*, 47 Cal. 388; *State v. Johnson*, 12 Nev. 121; *Dunlap v. State*, 9 Tex. App. 179; *State v. Wilson*, 24 Kan. 189.

Paraphrasing the expression of Lord Mansfield the paragraph might read: "The testimony of a witness in a former trial since deceased, or beyond the jurisdiction, or for any adequate reason unable to testify, is competent if it satisfactorily appears that the absence or disability is without the connivance or fault of the party offering the evidence. Provided always that the evidence offered was given in a former trial of the same action between the same parties and affected the same rights in issue."

The common law rule (in its application to parties examined as witnesses) has been incorporated into the N. Y. Code of Civil Procedure, § 830, which provides, "where a party has died since the trial of an action, or the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him."

It is pertinent to add that the death of the absent witness must be satisfactorily shown and that mere hearsay evidence calculated to establish it is inadmissible. *State v. Wright*, 70 Iowa, 152. See *Presumption of Death*, *ante*, § 18.

It may be taken as the rule, that where a party is deprived of the benefit of the cross-examination of a witness, by the act of the opposite party, or by the refusal to testify or other misconduct of the witness, or by any means, other than by the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read. *People v. Cole*, 43 N. Y. 508; *Smith v. Griffith*, 3 Hill, 333. See *Forrest v. Kissam*, 7 Hill, 465. And the rule may be applied to the examination of a witness on commission, or conditionally out of court, when, in such case, the party desiring the benefit of a cross-examination has not been present or represented at the taking of the testimony, and had no opportunity to push his exami-

nation, or to know the refusal of the witness to testify, or of his neglect to answer any question, or of other like misconduct of the witness. *Smith v. Griffith, supra.*

§ 225. **Testimony of the Accused on his Preliminary Examination.**—Immediately upon his arrest the party accused of crime is brought before a committing magistrate and examined with a view to determine the probability of his guilt or innocence. The testimony elicited on such examination, so far as it regards the accused, is not competent against him at the trial unless he is duly cautioned that any statement he may make is liable to be urged against him in his subsequent trial. *State v. Spier*, 86 N. C. 600; *People v. Darr*, 61 Cal. 544; *Dickerson v. State*, 48 Wis. 288; *Farkas v. State*, 60 Miss. 847; *Rector v. Com.* 80 Ky. 468; *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 845. •

The testimony of a mere witness on a preliminary examination may be given against him where subsequently he is indicted for offense. *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709.

We have previously stated the general rule that testimony either by witness or by the accused given in a former trial or investigation which is compulsory and tends to criminate them cannot be used.

On the preliminary examination or indeed in any trial whatever a neglect to cross-examine a witness assuming the presence of the right and opportunity to do so will not preclude the opposite party from introducing the testimony of the witness on a subsequent trial. *Forrest v. Kissam*, 7 Hill, 470; *Comins v. Hetfield*, 12 Hun, 375; *People v. Com.* 43 N. Y. 508.

Generally it may be said that it is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination. *People v. Cole, supra.*

Mr. Greenleaf says in section 163 of his work on Evidence: "But, where the testimony was given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties." See

also *Doncaster v. Day*, 3 Taunt. 262; *Glass v. Beach*, 5 Vt. 172; *Leightner v. Wilke*, 4 Serg. & R. 203; *Sheriden v. Smith*, 2 Hill, 538.

§ 226. **Summary of the Views here Stated.**—The most critical analysis of the entire topic relating to the examination of witnesses fails to disturb the well recognized principle that accords to the trial court a wide discretion in dealing with the subject. The number of witnesses sworn to prove a given fact, the extent of their examination, the order of the proof, the latitude indulged as to leading questions, the scope of the cross-examination, together with many other essentials connected with the trial of a criminal case combined to place within the control of the presiding judge many functions that tend to neutralize all set formulas regarding the subject. Especially is this true of criminal prosecutions where life and liberty are at stake, the previous analysis has shown that at every stage of the trial, evidence relevant to the issues will be admitted, at least on the part of the defendant. No arbitrary rules relating to direct, re-direct, rebutting or surrebutting evidence will be allowed to infringe the great constitutional right of personal liberty and the American juries are substantially a unit in recognizing the constant presence of that indefinable thing familiarly known and previously referred to as the “discretion of the court.”

Now it is familiar law carrying its own pregnant commentary that a discretionary order or ruling will not be disturbed by an appellate tribunal except for gross and palpable abuse. Is it not obvious, then, that any attempt to fetter a criminal trial by the dogmatic assertion of rules as to the examination of witnesses is a sheer dissipation of energy? It is with this theory well in mind that we find our warrant for cautioning the practitioner against too great a reliance upon technique in criminal prosecution.

CHAPTER XXXII.

IMPEACHMENT OF WITNESSES.

- § 227. *General Rules Relating to.*
228. *Great Latitude Allowed in Cross-examination.*
229. *To What the Attention of the Witness should be Called.*
230. *California Code Provisions on the Subject.*
231. *When the Impeachment is Effected.*
232. *Importance of Impeaching Testimony.*
233. *Partial Review of the Decisions.*
234. *When Party may Contradict his own Witness.*
235. *Statement of the New York Rule.*
236. *Inconsistent Statements may be Shown.*
237. *Discrediting Party's own Witness on Ground of Surprise.*
238. *Party may Impeach a Witness he is Compelled to Call.*
239. *Specific Acts of Immorality cannot be Shown.*
240. *An Examination of Authorities.*
241. *When Declarations Made out of Court are Admissible.*
242. *Interpreter may be Impeached.*

§ 227. **General Rules Relating to.**—In regard to the impeachment of witnesses, I will first refer to the earnest contention so familiar to the annals of our criminal courts, that inquiries as to particular acts are incompetent; and that impeachment can be accomplished only by evidence of the general reputation for truth and veracity. As a corollary to this first contention it is claimed that such evidence cannot be admitted under any circumstances without first inquiring of the witness sought to be thus impeached, whether the fact was true or not.

The general rule that a witness cannot be impeached by contradicting him as to collateral matters, is well understood. But it has been held, that the feelings of a witness, and his disposition to tell or conceal the truth in the particular suit in which he is called, are not collateral within the meaning of this rule. And he may therefore be impeached by showing that he has attempted to procure another witness to give false evidence in the same suit. *Folsom v. Brawn*, 25 N. H. 122; *Martin v. Farnham*, 25 N. H. 199; *Atwood v. Welton*, 7 Conn. 70; *Morgan v. Frees*, 15 Barb. 352; *Queen's Case*, 2 Brod. & B. 251.

If such evidence is admissible to impeach an ordinary witness it would more clearly be admissible against a party to the suit. An attempt by a party to sustain his claim in court by procuring a witness to commit perjury in support of it, would fairly warrant an inference that his claim was not founded in truth. And it must have been upon this principle that in *State v. Rohfrisch*, 12 La. Ann. 382, the prosecution was allowed to prove that the defendant had attempted to bribe one of the witnesses of the state to swear falsely. Such acts by a party would seem fairly admissible as circumstantial evidence which the jury are entitled to consider.

But where such evidence is admitted merely for the purpose of impeachment, it is perhaps the established rule, that the witness sought to be thus impeached must first be interrogated as to the fact. It was so held in the *Queen's Case*, above cited; and such is the general current of authority in this country, though there are cases where the rule has been denied. But in that case the reason of the rule was stated to be, that the witness might have an opportunity to explain. The Chief Justice said: "And it is in our opinion of great importance that this opportunity should be thus offered, not only for the purpose already mentioned, but because if not given in the first instance it may be wholly lost; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court and may not be found or brought back until the trial be at an end."

This shows, perhaps, a good reason for the rule. But where the reason fails, the rule fails also. *Martineau v. May*, 18 Wis. 59.

§ 228. Great Latitude Allowed in Cross-examination.—It is abundantly settled that in criminal prosecutions the rules of evidence accord to the cross-examiner great latitude in any attempt to impeach the character of the witness. In a very recent case the witness was asked: "Are you a prostitute?" Even if the witness claimed a privilege, the question should have been allowed. 1 Greenl. Ev. (4th ed.) § 445; Stark. Ev. 170; *Hall v. State*, 40 Ala. 699; *Com. v. Shaw*, 4 Cush. 594, 50 Am. Dec. 813. All the authorities hold that such a privilege, if any, is purely personal with the witness, and may be waived by the witness if he does not claim it himself. 1 Thomp. Trials, § 307; 1 Greenl. Ev.

§ 451; Whart. Crim. Ev. § 465; *Clark v. Reese*, 35 Cal. 89; *Short v. State*, 4 Harr. (Del.) 568; *Sodusky v. McGee*, 5 J. J. Marsh. 621; *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Roddy v. Finnegan*, 43 Md. 490; *State v. Bilansky*, 3 Minn. 246; *Newcomb v. State*, 37 Miss. 383; *Fries v. Brugler*, 12 N. J. L. 91, 21 Am. Dec. 52; *Pickard v. Collins*, 23 Barb. 444; *Southard v. Rexford*, 6 Cow. 255.

The foregoing authorities are ample warrant for the formula that, upon cross-examination, a witness may be asked any question which tends to test his accuracy or credibility or to impair his credit by compromising his character, but the extent to which such examination shall be allowed is in the discretion of the court.

But it is well settled that evidence of the good character of a party is not relevant in a civil action, or of a witness in an action, until evidence of the bad character of such party or witness may be given, or unless the issue involves the reputation of the party.

§ 229. To What the Attention of the Witness should be Called.—It has been proper at all times to discredit a witness by proof of contradictory statements as to a material matter; but it could not be done until he had been cross-examined as to the supposed contradiction in such a manner as to direct his attention to the matter assumed. The rule which prescribes this condition rests on the principle of justice to the witness.

The tendency of the evidence was to impeach his veracity, and common justice demands that before his credit is attacked he should have an opportunity to declare whether he made such statements to the person indicted, and to explain what he said, and what he intended and meant in saying it.

When this opportunity has been afforded him, justice can demand in his behalf nothing more, and the reason of the rule is satisfied. If he neither admits nor denies the statement, can it be proven?

The decisions of the English courts upon this question are conflicting. If the matter is irrelevant, the proof of contradictory statements is certainly inadmissible; but if it is relevant, the weight of the English authorities favor their admission. 2 Phil. Ev. 960.

This rule is sustained by American cases. *Payne v. State*, 60 Ala. 80; *Dufresne v. Weise*, 46 Wis. 290.

It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent

with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former statements.

The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible. *Queen's Case*, 2 Brod. & B. 287; *Newcomb v. Griswold*, 24 N. Y. 298, 2 Phil. Ev. 962; *Gaffney v. People*, 50 N. Y. 416.

§ 230. **California Code Provisions on the Subject.**—The rules as to the impeachment as at present administered, find concise and appropriate expression in the recitals of the California Code:

"A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. Whenever a writing is shown to a witness it may be inspected by the opposite party, and, if proved by the witness, must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness." Cal. Code Civ. Proc. §§ 2051, 2052, 2054. See also *McDaniel v. Baca*, 2

Cal. 326, 56 Am. Dec. 339; *Floyd v. Wallace*, 31 Ga. 668; *Shields v. Cunningham*, 1 Blackf. 86; *Lawrence v. Lanning*, 4 Ind. 194; *Galena & C. U. R. Co. v. Flay*, 16 Ill. 558, 63 Am. Dec. 323; *Foot v. Hunkins*, 98 Mass. 523; *New Orleans Draining Co. v. DeLizardi*, 2 La. Ann. 281; *Gerrish v. Pike*, 36 N. H. 510; *Charlton v. Unis*, 4 Gratt. 58; *Lamb v. Stewart*, 2 Ohio, 230; *Allen v. Harrison*, 30 Vt. 219.

§ 231. **When the Impeachment is Effected.**—Most if not all of the American jurisdictions hold that the impeachment of a witness is effected if sufficient testimony is introduced showing that from what is known of the witness's reputation for truth and veracity in the neighborhood in which he lives his averments or statements of any fact under oath should be discredited. *State v. Randolph*, 24 Conn. 363; *Bogle v. Kreitzer*, 46 Pa. 465; *Sergent v. Wilson*, 59 N. H. 396; *United States v. Vansickle*, 2 McLean, 219; *Warner v. Lockerby*, 31 Minn. 421; *Amidon v. Hosley*, 54 Vt. 25; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Hillis v. Wylie*, 26 Ohio St. 574; *Laclede Bank v. Keeler*, 109 Ill. 385; *Shaw v. Emery*, 42 Me. 59; *Atwood v. Impson*, 20 N. J. Eq. 150; *Lenox v. Fuller*, 39 Mich. 268; *Teese v. Huntingdon*, 64 U. S. 23 How. 2, 16 L. ed. 479.

In Indiana and Iowa and Missouri the impeachment is effected by showing the general moral character of the witness to be bad. *Walton v. State*, 88 Ind. 9; *State v. Egan*, 59 Iowa, 636; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. California substantially follows New York. *People v. Markham*, 64 Cal. 157, 49 Am. Rep. 700. In Illinois, where it is shown that the general character of the witness among his neighbors for truthfulness is bad, it is erroneous to let the impeaching witness answer, whether he would believe such witness upon oath. *Eason v. Chapman*, 21 Ill. 33. The knowledge of a witness's character must be derived from his general reputation.

§ 232. **Importance of Impeaching Testimony.**—When a witness gives material evidence it is always important to ascertain and discover how much weight, or reliance, can be placed upon his testimony. Whatever may weaken or tend to discredit his evidence is important and material and necessarily affects the determination of the issue. *Shepard v. Parker*, 36 N. Y. 517.

If the testimony of the witness is unassailed by any discrediting circumstances, then it will obviously be attended with greater

effect in the determination of the controversy, than it would be, if he should be shown to be a person unworthy of full credit. Whatever may tend to sustain or support a witness, is, therefore, material to the issue, so far as it may increase the confidence to be placed in his statement. And, likewise, whatever may tend to discredit him, and in that manner to reduce the confidence his evidence may deserve, will materially affect the determination of the issue in controversy. No special degree of materiality to create the crime of perjury has been defined or required, but all that can be insisted upon, is that the evidence itself shall appear to have had some material bearing in the determination of the case, and whatever may tend to the discredit of the witness, giving material evidence, must be regarded as within this rule. In *Reg. v. Overton*, 2 Moody, C. C. 263, it was held that everything was material that affects the credit of the witness, and that every question on cross-examination that goes to the credit of the witness is material. In *Com. v. Bonner*, 97 Mass. 587, the same conclusion was reached.

§ 233. **Partial Review of the Decisions.**—The Tennessee supreme court held in *Story v. Saunders*, 8 Humph. 666, that “a witness cannot be confirmed by proof that he has given the same account before, even though it has been proved that he has given a different account in order to impeach his veracity, for his mere declaration of the fact is not evidence;” although exceptions to this rule have been admitted.

The question again came before this court in *Possett v. Miller*, 3 Sneed, 76, where error was assigned to the ruling of the court below, which ruling was as follows: “Where the credit of a witness is attacked, upon the ground that he had made statements inconsistent with the statements he had made in court, testimony may be heard to show that at other times and on other occasions the witness had made statements consistent with his testimony given in court.”

It will be observed that this is a broad statement of the rule, and is in conflict with the rule stated in *Story v. Saunders*, *supra*, unless the facts of the case brought it within the exceptions of “special circumstances,” but the facts are not given, and we cannot see whether the “special circumstances” existed. In passing upon this ruling at the circuit court, Judge Caruthers said: “Upon this question there is a very great conflict in the authorities. In

1 Greenleaf on Evidence, § 469, such evidence is declared to be inadmissible unless where a design to misrepresent is charged upon the witness in consequence of his relation to the party or to the cause, in which case it seems it may be proper to show that he made a similar statement before that relation existed." This is a statement of the "special circumstances" which would take the case out of the general rule as stated by Judge McKinney in *Story v. Saunders, supra*.

Continuing, the court said: "We think the case put by Mr. Greenleaf above is a proper one for the admission of previous consistent confirmatory statements, but would also allow it in all cases where the evidence given in court is impeached by proving former contradictory statements." He then holds that there was no error in the ruling of the court below.

In *Queener v. Morrow*, 1 Coldw. 134, Judge McKinney, after stating the rule as given by Greenleaf, says: "The case of *Dossett v. Miller* sanctions the principle that evidence of previous consistent statements is admissible in all cases where the testimony of the witness, given in court, is sought to be impeached by proof of contradictory statements." He then says: "The abstract principle announced we are not disposed to disturb," and proceeds to dispose of the case on that basis, but limits the consistent statements of those made antecedent to the impeaching statements which they are intended to meet.

In *Third Nat. Bank v. Robinson*, 1 Baxt. 484, Judge McFarland quotes from and approves the cases of *Dossett v. Miller* and *Queener v. Morrow*, and approves the act of the court below in admitting proof of the consistent statements of the witness, although the facts did not bring the case within the exception of "special circumstances."

In *Hayes v. Cheatham*, 6 Lea, 10, Judge Cooper refers to the cases of *Dossett v. Miller*, *Queener v. Morrow*, and *Third Nat. Bank v. Robinson, supra*, and says the rule is that where it "is sought to destroy the credit of a witness by proof of contradictory representations, evidence of his having given the same account of the matters, at a time when no motive existed to misrepresent the facts, ought to be received, because it naturally tends to inspire in the sworn statement." The facts of that case brought it clearly within the exception of "special circumstances."

In *Glass v. Bennett*, 89 Tenn. 481, Chief Justice Turney quoted

the rule as stated in *Hayes v. Cheatham*, *supra*, and held that proof of consistent statements was properly admitted. It did not appear in that case that the facts brought it within the exception of "special circumstances," but it came within the broad rule laid down in *Dossett v. Miller*, *supra*, and reaffirmed in *Queener v. Morrow* and *Third Nat. Bank v. Robinson*, *supra*. His conclusion was that, "whatever may be the rule in other states, and whatever might be our view of the question as an original question, the rule in this state is, that previous consistent confirmatory statements, made before the impeaching statement, are admissible in all cases where the evidence given in court is impeached by proving former contradictory statements."

In *Bounds v. Schwab*, 5 Sneed, 594, the impeaching statement was made under oath in an oral examination in another case, but in reference to the same transaction. Afterwards the deposition of the witness was taken, and his testimony did not agree with his previous testimony in the other case; but his attention was not called to his previous testimony so as to give him an opportunity to explain it. It was then sought to impeach his deposition by proving his previous contradictory testimony. It was held that this could not be done, because his attention had not been called to the previous testimony so as to give him an opportunity to explain it.

In *Nelson v. State*, 2 Swan, 259, the impeaching statement was contained in the testimony of the witness given before the committing magistrate, and signed by the witness. It was held that this impeaching statement was not admissible to contradict the witness unless his attention had been called to it, and opportunity given him to explain it.

In *Hammond v. Dike*, 42 Minn. 273, 18 Am. St. Rep. 506, the impeaching statement was contained in a deposition, and the same rule was applied in the Tennessee cases and a similar reasoning supports the rule that the minutes of the evidence given by witnesses on a preliminary examination cannot be used on the trial of the defendant to impeach such witnesses. *State v. Adams*, 78 Iowa, 292. Nor can a witness be corroborated by proving that on other occasions he made statements conforming to his testimony, for such statements are but hearsay; nor can one who introduces a witness directly attack his credibility by proving facts irrelevant to the issue. *Madden v. State*, 65 Miss. 176.

A defendant who testifies on his own behalf, on the trial of a criminal case, may be impeached in the same manner as any other witness; but the jury should be instructed to consider impeaching testimony as affecting only his credibility as a witness, and not as impairing the presumption of his innocence. *Peck v. State*, 86 Tenn. 259.

Judge Grover in Real v. People, 42 N. Y. 280, says: "A witness introduced by the accused, and who gave material testimony in his favor, was asked by the district attorney upon cross-examination, whether he had not been in the penitentiary, and how long he had been there. These questions were objected to by the counsel for the accused without a specific statement, calling attention to the fact of their being record evidence. The objection was overruled, and the counsel excepted. The witness answered that he had, and stated the time, adding, that he was innocent of the crime. Waiving the question whether the ground was sufficiently stated, there can be no doubt that this testimony was material, and tended to prejudice the accused by impairing the credit of the witness, and if incompetent, the judgment should be reversed. The counsel now insists, that this point was decided in favor of the accused in *Newcomb v. Griswold*, 24 N. Y. 298, by this court. It was held in that case, that it was error to overrule the objection of the opposite party to a question proposed upon the cross-examination of a witness, with a view to impair his credit, whether he had not been convicted of petit larceny, and the judgment was reversed upon this ground, the court holding, that if the fact was at all admissible, it could only be proved by the record. The same rule is laid down in volume 1 of *Greenleaf on Evidence*, § 457, where it is further added, that if the inquiry is confined in terms to the fact of his having been subjected to an ignominious punishment, or to imprisonment alone, it is made not for the purpose of showing that he was an innocent sufferer, but that he was guilty, and the only competent proof of his guilt is the record of his conviction. If the rule thus laid down by this author is correct, it is manifest that the exception in the present case was well taken. But I think that such is not the rule. It is well settled, that for the purpose of impairing the credit of a witness, by evidence introduced by the opposite party, such evidence must go to his general character. That proof of specific acts of immorality is not competent, see authorities cited in 1 *Greenl. Ev.*

§ 461. Yet it is held, that for the purpose of discrediting his testimony, the witness may be asked upon cross-examination, as to specific facts. 1 Greenl. Ev. § 456. This shows that upon a cross-examination of a witness, with a view of testing his credibility, inquiries are proper as to facts not competent to be proved in any other way. Such inquiries do not relate to the issue directly upon trial, but relate only to the credibility of the witness. They are entirely collateral to the principal issue. As to the former the same strictness is not required when the evidence is confined to the cross-examination of the witness introduced by the opposite party. In such examination the presumption is strong, that the witness will protect his credibility as far, at least, as truth will warrant. All experience shows this to be so. It would be productive of great injustice often, if where a witness is produced, of whom the opposite party has never before heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails, and other prisons for crimes, if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps states, which for the purposes of the trial are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might in some cases, wholly defeat the ends of justice. My conclusion is, that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison or in any other place that would tend to impair his credibility, and how much of his life he has passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply."

§ 234. **When Party may Contradict His Own Witness**—On this important subject, a recent case from Indiana may be regarded as authority. Upon a very careful investigation of the subject, the reasoning of *Judge Elliott* seems to accurately state the present posture of the law in reference to this topic. In nearly every criminal prosecution, owing to the peculiar circumstances with which crime is committed and its perpetrators known, one of the first difficulties that confront the prosecution, *is the character of the witnesses* by which it is required to prove its case. It would grossly hinder the administration of justice, if the prosecuting attorney was ab-

solutely concluded by the statement of witnesses on the stand. Obviously, this would be a monstrous perversion of justice. The subject is regulated by statute in many jurisdictions, and the exposition given it by the Indiana court, gives every reason that can support the rule. It is said: "It is no doubt true that the state may, in the proper case, contradict its witnesses by evidence of contradictory statements made out of court. *Conway v. State*, 118 Ind. 482. Justly limited and rightly applied, the statutory rule is a wise and salutary one, but if not properly limited and employed it may be very unjust and mischievous. If a party may call a witness, elicit from him only what is expected and what is not prejudicial, and then prove statements made out of court by the witness, great harm may be done the adverse party. It happens, as the decisions and the books show, that witnesses make careless or reckless statements out of court, which they will not make under oath, and such statements ought not to be brought out by the party who produces the witness unless the testimony of the witness is prejudicial to him. It is, indeed, doubtful whether they can be brought out where there was no obligation on the party to call the witness, and the testimony was what the party knew, or had reason to believe, the witness would give. It is true that evidence of such statements is theoretically evidence affecting credibility only, and is not evidence of the facts embraced in the contradictory statements; but nevertheless, evidence of contradictory statements does often influence the jury. The limitation placed upon the statutory rule by the decisions is a wise one. That limitation is this: Where the witness gives no prejudicial testimony upon that point to which the contradictory statements relate, evidence of statements made out of court is not competent. Where the party calling the witness is surprised by his testimony, or where it is prejudicial then contradictory statements as to the point upon which the evidence is prejudicial is competent, otherwise not. *Hull v. State*, 93 Ind. 128; *Conway v. State*, 118 Ind. 482, and cases cited; *Miller v. Cook*, 124 Ind. 101. In the case last cited it was rightly held that the contradictory statements must relate to the point upon which the evidence is prejudicial, and so we hold here." Elliott J. in *Rhodes v. State*, 128 Ind. 189.

§ 235. **Statement of the New York Rule.**—The rule upon this subject of impeachment has frequently been made a matter

of consideration by the New York courts, and it is now well established that to entitle the party interrogating the witness by way of cross-examination, to introduce evidence to contradict his statements, the cross-examination must be directed to a material inquiry in the case, or to evidence establishing a hostile or unfriendly bias, against the party in the mind of the witnesses. *Carpenter v. Ward*, 30 N. Y. 243, 245; *Plato v. Reynolds*, 27 N. Y. 586; *First Baptist Church v. Brooklyn F. Ins. Co.* 28 N. Y. 153; *Chapman v. Brooks*, 31 N. Y. 75, 87; *Stokes v. People*, 53 N. Y. 164, 175, 176; *Schultz v. Third Ave. R. Co.* 89 N. Y. 243..

§ 236. **Inconsistent Statements may be Shown.**—The party producing a witness is not allowed to impeach his credit by evidence of bad reputation, except when he is compelled to produce him by reason of the nature of the evidence sought, but he may contradict him by other evidence, and may also ask him whether he has not made, at other times, statements inconsistent with his present testimony. Under all rules of reason he is not allowed to contradict his witness upon any particular and material fact. *Norwood v. Kenfield*, 30 Cal. 393; *Rockwood v. Poundstone*, 38 Ill. 199; *Thorn v. Moore*, 21 Iowa, 285; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Cronan v. Roberts*, 65 Ga. 678; *Gray v. Gray*, 3 Litt. (Ky.) 465; *Shelton v. Hampton*, 28 N. C. 216; *Warren v. Gabriel*, 51 Ala. 235; *Brown v. Osgood*, 25 Me. 505; *Bradford v. Bush*, 10 Ala. 386; *Hall v. Houghton*, 37 Me. 411; *Wolfe v. Hauver*, 1 Gill, 84; *Brolley v. Lapham*, 13 Gray, 294; *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Brown v. Wood*, 19 Mo. 475; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457; *Seavy v. Dearborn*, 19 N. H. 351; *Skellinger v. Howell*, 8 N. J. L. 383; *Lawrence v. Barker*, 5 Wend. 301; *Winstan v. Moseley*, 2 Stew. (Ala.) 137; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Hunt v. Fish*, 4 Barb. 324; *Thompson v. Blanchard*, 4 N. Y. 303; *People v. Skeehan*, 49 Barb. 217; *Keutgen v. Parks*, 2 Sandf. 60; *Pickard v. Collins*, 23 Barb. 444; *Parsons v. Suydam*, 3 E. D. Smith, 276; *Bok v. Vincent*, 12 Abb. Pr. 137; *Bemis v. Kyle*, 5 Abb. Pr. N. S. 232; *Gibbs v. Huyler*, 9 Jones & S. 190; *Farr v. Thompson*, Cheves, L. 37; *Stockton v. Demuth*, 7 Watts, 39; *Hice v. Coax*, 34 N. C. 315.

So a party may contradict his own witness by evidence of statements made out of court. The only limitation is that the witness shall not be contradicted unless he has given testimony prejudicial

to the party by whom he was called. *Judy v. Johnson*, 16 Ind. 371; *Hill v. Goode*, 18 Ind. 207; *Hull v. State*, 93 Ind. 128. In *Hill v. Goode*, *supra*, the court said, "that a party may prove previous statements of his own witness contradictory to those sworn to on the given trial." Other courts have so decided. *Blackburn v. Com.* 12 Bush, 181; *Champ. v. Com.* 2 Met. (Ky.) 17; *Dear v. Knight*, 1 Fost. & F. 433; *Hemingway v. Garth*, 51 Ala. 530; *Com. v. Donahoe*, 133 Mass. 407; *White v. State*, 10 Tex. App. 381.

A party cannot, after examining a witness, give in evidence his former testimony and declarations, ostensibly to discredit him, but in truth to operate an independent evidence. *Smith v. Price*, 8 Watts, 447.

He is not at liberty to discredit his own witness by showing his former declarations on the same subject (*Sanchez v. People*, 22 N. Y. 147); though he may show the truth of the facts by other witnesses. The fact that the other side has also examined the witness in chief does not change the rule. *Ellicott v. Pearl*, 35, U. S. 10 Pet. 412, 9 L. ed. 475.

The state cannot impeach her own witness. *Quinn v. State*, 14 Ind. 589.

But it has been held in North Carolina that the attorney general may produce evidence to discredit a witness for the commonwealth. *State v. Norris*, 2 N. C. 438. But see *Brown's Cases*, 3 City Hall Rec. 151; *Queen v. State*, 5 Harr. & J. 232; 1 Roscoe, Crim. Ev. 159.

Texas Code of Criminal Procedure, article 755, provides that "the rule that the party introducing the witness shall not attack his testimony is so far modified that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any manner, except by proving his bad character;" but before this rule can be applied, the witness must have stated some fact in evidence which was injurious to the party in whose behalf he was testifying; and it is not sufficient that he merely made a statement different from that which the party had reason to and did believe he would make. *Bennett v. State*, 24 Tex. App. 73.

The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witness to an instrument. *Dennett*

v. *Dow*, 17 Me. 19; *Whitman v. Morey*, 63 N. H. 448; 1 Roscoe, Crim. Ev. 160; Best, Ev. (Chamberlayne's ed.) § 644.

§ 237. **Discrediting Party's own Witness on Ground of Surprise.**—A party who calls a witness, and is taken by surprise by his unexpected and unfavorable testimony, may interrogate him in respect to declarations and statements previously made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection, and inducing him to correct his testimony or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him. In case the witness denies having made such statements, or his answer is ambiguous concerning them, it is not competent for the party calling him to prove them by other witnesses. *Hurley v. State*, 4 L. R. A. 161, 46 Ohio St. 320.

In the case last cited *Mr. Justice Williams* collates many valuable authorities in the course of his opinion and subjects them to analysis in the following language: "In the case of *Com. v. Welsh*, 4 Gray, 535, it is held that, 'A witness who has testified in chief that he does not know certain facts, cannot, although he shows a disposition to conceal what he knows, be asked by the party calling him whether he did not on a former occasion swear to his knowledge of those facts.' In the course of the opinion, Shaw, *Ch. J.*, said: 'The evidence of what the witness testified before the grand jury ought not to have been received. It bore upon no question pertinent to the issue. . . . It could only be to disparage the witness, and show him unworthy of credit with the jury, which was inadmissible.' The same rule was followed in the case of *People v. Jacobs*, 49 Cal. 384. On the trial of a prosecution for rape a witness was called by the prosecution to prove threats by the prisoner. The witness testified the prisoner made no threats, and the prosecutor was then permitted to call a witness who testified that in a conversation with him the former witness stated the prisoner had made threats. For the admission of this evidence the judgment was reversed.

"In *Melluish v. Collier*, 14 Jur. 621, 15 Q. B. 878, it is held that 'where a witness gives evidence adverse to the party who calls him, he may be asked whether he has not given a different account of the matter in question before the trial, but if the witness denies it, the person to whom he gave that account cannot

be called to contradict him;' and 'Where a witness gives evidence of a fact adverse to the party who calls him, other witnesses may be called to disprove the fact, if it be relevant to the issue in the cause.' See also *Holdsworth v. Dartmouth*, 2 Mood. & R. 153; *Allay v. Hutchings*, 2 Mood. & R. 358, *note*; *Winter v. Butt*, 2 Mood. & R. 357.

"This is the doctrine maintained by a long line of American cases, among them the following: *Thompson v. Blanchard*, 4 N. Y. 311; *Pollock v. Pollock*, 71 N. Y. 137; *Coulter v. American Merchants U. Exp. Co.* 56 N. Y. 588; *Nichols v. White*, 85 N. Y. 531; *Gadsby v. Dyer*, 91 N. C. 312; *Becker v. Koch*, 104 N. Y. 394; *Cox v. Eayres*, 55 Vt. 24; *Bauskett v. Keitt*, 22 S. C. 187; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Baltimore & O. R. Co. v. State*, 41 Md. 268; *Bullard v. Pearsall*, 53 N. Y. 230; *Stearns v. Merchants Bank of Cleveland*, 53 Pa. 490; *Queen v. State*, 5 Har. & J. 232; *Adams v. Wheeler*, 97 Mass. 67.

"Statutes, similar in their provisions to the English Common Law Procedure Act, have been adopted by Massachusetts, Kentucky, Georgia, and some of the other states. The enactment of such statutes is, itself, a recognition of the necessity of a resort to legislation to accomplish the change in the rule thereby effected, and has been so regarded by the courts of the states where they have been adopted."

Proof that a witness had made material false statements, which are relied on as proving him unworthy of credit, will not authorize the party calling him to introduce evidence of his general reputation for truth. *Crown v. Mooers*, 6 Gray, 451; *Roscoe*, Crim. Ev. 160.

A party may prove the previous contradictory declarations of a witness whom he has called to the stand, when it is established that he was surprised at his testimony, and was not guilty of collusion or bad faith, and that the witness was adverse to him (*Hurlburt v. Bellows*, 50 N. H. 105; *Whitman v. Morey*, 63 N. H. 448; *Craig v. Grant*, 6 Mich. 453; *Campbell v. State*, 23 Ala. 77; *Com. v. Starkweather*, 10 Cush. 60; *Stearns v. Merchants Bank of Cleveland*, *supra*; *People v. Safford*, 5 Denio, 112; *Coulter v. American Merchants U. Exp. Co.* *supra*; *People v. Jacobs*, 49 Cal. 384; *Dunn v. Dunnaker*, 87 Mo. 597; *Hunt v. Fish*, 4 Barb. 324; *Burkhalter v. Edwards*, *supra*) or where it

is shown to the satisfaction of the court that he has been deceived by the fraud or artifice of such witness; and even then the foundation must first be laid for such evidence by calling the attention of the witness to the time, place and person before whom such supposed contradictory declarations were made, and affording him opportunity for explanation. *Dunlap v. Richardson*, 63 Miss. 447.

§ 238. **Party may Impeach a Witness he is Compelled to Call.**—There is quite an array of authority for the proposition that where a party is compelled to call a certain witness he may both contradict and discredit him. *Shorey v. Hussey*, 32 Me. 579; *Cox v. Eayres*, 55 Vt. 24.

But he cannot sustain his own witness by proving by an independent witness he made the same statement at a prior time or as to an independent fact testified to by such witness. *Smith v. Stickney*, 17 Barb. 489; *People v. Finnegan*, 1 Park. Crim. Rep. 147; *Herrick v. Smith*, 13 Hun, 448; *People v. Rugg*, 21 N. Y. Week. Dig. 85, 34 Hun, 632, mem.; affirmed without discussing that point in 98 N. Y. 537, 552, 3 N. Y. Crim. Rep. 172; *Stolp v. Blair*, 68 Ill. 541; *Childs v. State*, 55 Ala. 25; *Snyder v. Com.* 85 Pa. 519; *Webb v. State*, 29 Ohio St. 351.

The Kentucky statute on the subject is contained in section 660 of the Civil Code of Procedure, which is also made applicable to criminal cases. It provides that "the party producing a witness may contradict him by showing that he has made statements different from his testimony."

In the case of *Champ v. Com.* 2 Met. (Ky.) 17, it was said that prior to the adoption of the code, a party who was surprised by the testimony of his own witness, was allowed to contradict him, only by proving that the facts stated in evidence were different. By the code, as already shown, an additional means of contradiction is allowed—it may be shown that the witness has made statements different from his present testimony.'

In *Brooks v. Weeks*, 21 Mass. 433, Endicott, J., in commenting upon the Massachusetts statute says: "Before its passage the witness could not be directly contradicted. The object of the statute is simply to allow the party to impeach the credibility of his witness by showing in the manner pointed out, that he has made statements inconsistent with his testimony."

And in *Ryerson v. Abington*, 102 Mass. 526, Gray, J., after

quoting the statute proceeds as follows: "So great a change in the rules of evidence, giving so extensive a power to a party to introduce proof in contradiction and disparagement of a witness put upon the stand by himself, uncontrolled by the discretion of the judge before whom the trial is had, must be kept strictly within the bounds of the statute."

The mere failure on the part of a witness to testify as expected by the party calling him will not enable said party to show otherwise alleged statements made by the witness or others tending to prove the case. *People v. Jacobs*, 49 Cal. 384; 1 Roscoe, Crim. Ev. 159.

§ 239. **Specific Acts of Immorality cannot be Shown.**—In Abbott's Trial Brief of Criminal Causes, § 473, we find the following: "A witness who has testified to the good character of the accused may be asked, on cross-examination, if he has not heard of a specified charge against the accused,"—citing *Ingram v. State*, 67 Ala. 67, which was a murder case wherein it was held: "The shadings, as well as the brighter hues, are to be considered in making up the estimate of character and reputation, and, when a witness has testified that he knew the character of the accused, for peace and quietude, and that it was good, it is not error to allow him to be asked, on cross-examination, if he had not been informed that the defendant had 'killed a man in the state of Georgia,' and his answer was admissible in evidence." *Reg. v. Wood*, 5 Jur. 225, and *Dearman v. State*, 71 Ala. 351, are also cited by the author in support of this proposition.

In *Reg. v. Wood*, *supra*, the defendant put his character in issue, and a witness deposed to having known him for some years, gave him a good character, and stated that he had never heard anything against him. On cross-examination, the witness was asked if he had never heard that defendant was suspected of having committed a robbery in the neighborhood some years previous. The question was allowed, Parke, *B.*, remarking that: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." This case is cited approvingly in 1 Taylor on Evidence, § 352, and the author says: "But if, with the view of raising a presumption of innocence, witnesses to character are called for the defense, the counsel

for the Crown may then rebut this presumption by cross-examining the witnesses, either as to particular facts, or, if they deem it essential, as to the ground of their belief." *Reg. v. Wood*, is also cited approvingly in *Best on Evidence*, § 261, where the doctrine is also laid down that, when a defendant in a criminal prosecution puts his character in issue, the prosecutor may encounter his evidence either by cross-examination or by contrary testimony.

§ 240. **An Examination of Authorities.**—In *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302, the prisoner was on trial for burglary and larceny, and having taken the stand as a witness in his own behalf, was asked on cross-examination if he had been arrested on a charge of bigamy. The court held the question inadmissible, and stated the true rule to be that the disparaging questions must either be relevant to the issue, or such as clearly go to impeach the moral character and credibility of the witness. In *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183, the question asked the party testifying in his own behalf was how many times he had been arrested, and it was held inadmissible. In *Ryan v. People*, 79 N. Y. 594, the witnesses were asked if they had been indicted. The court, recognizing the right to put questions to a witness as to specific facts which tend to discredit him or impeach his moral character, held that the fact of an indictment could not produce such result, since it was merely an accusation and innocence was presumed. In *People v. Oyer & Terminer Ct.* 83 N. Y. 460, the court said of this class of questions that its control over them was not absolute, and that, as a general rule, the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character; and to the same effect was *People v. Casey*, 72 N. Y. 393. This decision nearly restates the position taken by the old court of errors in 1823: "Evidence that a female is by reputation unchaste, is not competent by way of impeachment. Indeed a witness cannot be impeached by proof of any specific immorality. It must rest on general moral character, or character for truth. *Bakeman v. Rose*, 18 Wend. 146, and cases cited." Nor can "character" be proved by reputation.

In the case of *Robinson v. State*, 84 Ind. 452, the defendant had testified in his own behalf, and the state, for the purpose of

impeaching the defendant as a witness, called a witness and proved by the witness that he was acquainted with the defendant's general moral character, and that it was bad. The defendant's counsel cross-examined the witness, asking the question: "The defendant has the reputation of being a drinking, swearing man, has he not?" The witness answered: "He has." On re-examination, the state asked the witness, "What is the defendant's reputation for honesty?" The defendant objected, and the court overruled the objection, and the witness answered that it was bad. On appeal the court held that the evidence was improper, and that the court erred in admitting it. *Drew v. State*, 124 Ind. 9.

In Tennessee it has been long and well settled that in impeaching the credibility of a witness the inquiry is not, as in some of the states, restricted to the general reputation for veracity, but it involves his whole moral character. It has been regarded as essential to the ends of justice that both the court and jury should have full opportunity of knowing the entire moral character of the witness where credit is sought to be impeached. "In view of all of which," as was said by Judge McKinney in *Gilliam v. State*, 1 Head, 38, "It may be safely left to the jury to determine what degree of credit the witness is entitled to for truth, notwithstanding his other vices and immoralities of character, as his claim to veracity is the primary and important consideration."

According to the practice in that state, the proper inquiry is whether the witness knows the general character of the person whose credibility is in question, and whether, from such knowledge, the witness would believe him on oath. *Ford v. Ford*, 7 Humph. 92; *Merriman v. State*, 3 Lea, 394; *Peck v. State*, 86 Tenn. 259.

In a recent Arkansas case, the state having proved certain damaging facts, by the principle witness, the appellant seeking to vitiate this evidence, introduced an impeaching witness who testified that he knew the witness for the state, and had lived near her for seven years, and knew her general reputation for truth and morality in the neighborhood in which she lived, and that it was not good; he considered it bad. Appellant then asked him, if, taking such reputation as a basis, would he believe her on oath? The state objected to his answering the question; the court sustained the objection; and appellant excepted. According to pre-

vious decisions and the practice which has long prevailed, the question was proper and should have been answered. *Pleasants v. State*, 15 Ark. 651; *Mansfield*, Dig. § 2902; *Snow v. Grace*, 29 Ark. 136.

§ 241. **When Declarations Made out of Court are Admissible.**—Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of the cause, is as a general, and almost universal rule, inadmissible.

It seems, however, that to this rule there are exceptions, and that under special circumstances such proof will be received; as where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness, is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen. *Robb v. Hackley*, 23 Wend. 50.

§ 242. **Interpreter may be Impeached.**—Inherent power is vested in the courts to resort to the aid of a skilled interpreter or professional linguist in all cases where it is necessary to translate the evidence to the court, counsel, jury, or parties interested. *Skaggs v. State*, 108 Ind. 53; *Thomason v. Territory*, 4 N. M. 150; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

The accuracy of the translation may be controverted and in rebuttal the interpreter may be impeached. Indeed the value of his entire rendering of the evidence is for the exclusive determination of the jury. *Skaggs v. State*, *supra*; *Sohnier v. People*, 23 Ill. 17.

CHAPTER XXXIII.

DEPOSITIONS IN CRIMINAL CASES.

§ 243. *Only Admitted by Force of Statute.*

244. *Exposition of this Subject by New York Court of Appeals.*

a. *Extreme Importance of the Right.*

b. *Views of Distinguished Judges.*

245. *New York Criminal Code Provisions Stated.*

246. *Statement of the English and California Rule.*

247. *Examination of Witnesses Conditionally for the Accused.*

§ 243. **Only Admitted by Force of Statute.**—In criminal cases in the United States, it has been held that depositions cannot be used without the consent of the defendant, and the Constitution of the United States declares that the accused shall enjoy the right to be confronted with the witnesses against him, and this provision has been incorporated in the constitutions of most of the states, or recognized as statutory law. In some states provision is made for the taking of depositions by the accused. Greenleaf's opinion is, that no deposition is admissible by force of English or American statutes, unless taken wholly in the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses, under the constitutional provisions before mentioned; nor even then, except as secondary evidence, the deponent being dead, or out of the jurisdiction, or to impeach his testimony given orally at the trial. And it is stated, as a general rule, that depositions are in no case admissible in criminal proceedings, unless by force of express statutes, or possibly by consent of the prisoner in open court. Even in the case of informations before a justice of the peace, numerous authorities hold that they should be taken in the presence of the prisoner. Weeks, *Depositions*, § 557, citing 3 Greenl. Ev. § 11; *McLane v. State*, 4 Ga. 335; *Rex v. Thatcher*, T. Jones, 53; 3 T. R. 722; *Sills v. Brown*, 9 Car. & P. 601; *Rex v. Grady*, 7 Car. & P. 650; *Rex v. Coveney*, 7 Car. & P. 667; *Bostick v. State*, 3 Humph. 344; *State v. Bowen*, 4 McCord, L. 254; *State v. Valentine*, 29 N. C. 225; *Dominges v. State*, 7 Smedes & M. 475; *Rex v. Paine*, 5

Mod. 163; *Rex v. Eriswell*, 3 T. R. 722; *Rex v. Errington*, 2 Lew. C. C. 142; *Rex v. Woodcock*, 1 East, P. C. 356; *Rex v. Smith*, 2 Stark. 208. But see *Reg. v. Walsh*, 5 Cox, C. C. 115; U. S. Const. 6th Amend.; Ohio Const. art. 1, § 10; Conn. Const. art. 1, § 9.

There is no constitutional inhibition against the state allowing defendants in criminal cases to take and use the depositions of witnesses in their behalf. The constitution entitles the accused, in criminal and penal cases, to meet his accusers face to face, and to be confronted with the witnesses against him. The state, therefore, cannot authorize the taking and using of depositions of witnesses against him, but he may use the depositions of witnesses in his behalf under any state of case that the legislature may allow. *Kaelin v. Com.* 84 Ky. 354.

In criminal prosecutions in this country depositions are rarely employed; but where the accused has had an opportunity to cross-examine the witness whose deposition it is thought to introduce, he has no reason to complain that the constitutional guaranty has been violated. Such instance arises where, in a former trial, the accused was confronted with the witness, or on preliminary hearings before a coroner or committing magistrate. And it seems that notes taken on such occasion, are admissible in evidence where the witness has since died or is beyond the jurisdiction of the court. See *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740; *State v. Chambers*, 43 La. Ann. 1108.

The right to a deposition in criminal cases is exclusively that of the accused, and by order of the court they may be taken in the manner prescribed for taking depositions in civil cases after due notice to the district attorney. Tennessee Code, § 6223.

If the witness be a prisoner, an order for his examination in the prison upon deposition, or for his temporary removal and production, before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court or judge thereof in which the action, suit, or proceeding is pending, unless it be a court of a justice of the peace;
2. By any judge of a court of record, when the action, suit, or proceeding is pending in a justice's court, or when the witness's deposition, affidavit, or oral examination is required before a judge or other person out of court;

3. Such order shall only be made upon the affidavit of the party desiring the order, or some one on his behalf, showing the nature of the action, suit, or proceeding, the testimony expected from the witness, and its materiality;

4. If the witness be imprisoned in the county where the action, suit, or proceeding is pending, and for a cause other than a sentence for felony, his production may be required; in all other cases, his examination shall be taken by deposition. Hill, Ann. Law of Oregon, § 801.

Depositions can only be admitted in criminal cases under local statute, and in submission to the constitutional guarantees as to the personal examination of witnesses. Whart. Crim. Ev. § 306; *People v. Murphy*, 1 N. Y. Crim. Rep. 102; *People v. Gannon*, 61 Cal. 476.

Under statutes or by consent of the prosecuting officer, evidence may be taken for the defendant by ordinary deposition. Bishop, Crim. Proc. (3d ed.) § 1206. See *People v. Restell*, 3 Hill, 289.

But in order to render such a deposition competent evidence, the examination must in general be in the presence of the accused, so that he may know the precise words which the witness uses, and observe throughout his manner of testifying. If desired by the accused, he has a right that his counsel shall be present during the examination. A reasonable time after the arrest should be allowed for the purpose of employing counsel, where the accused requests it, and if the magistrate refuse this, the deposition will not be evidence. The answers of the witness should be on oath, and hence, instead of taking the examination first and then swearing him to the truth of the statement, he should be sworn before the examination commences. The deposition should be taken as nearly as possible in the exact words of the witness. *People v. Restell*, *supra*.

It is essential that the accused should have a full and fair opportunity of cross-examining; and if this be denied him, the deposition will not be competent evidence. The deposition will be invalid, moreover, if the oath administered to the witness do not extend to his answers to questions put; *e. g.*, where it is merely to the truth of a statement previously drawn up. *People v. Restell*, *supra*.

According to the provisions of the California Penal Code, the right to take the deposition of a witness on behalf of the people,

in a criminal case, arises out of the fact that the witness is unable to procure sureties for his appearance on the trial; and that fact must be satisfactorily established by the examination on oath of the witness himself, or of some other person. When the fact has been judicially ascertained, the right to take the deposition of the witness may be put in motion. But the examination of the witness must be had in the presence of the defendant, or after due notice to him, and "must be conducted in the same manner as the examination of a witness before a committing magistrate is required by the penal code to be conducted." Taking the testimony of a witness on behalf of the people in a criminal case by deposition, is an exception to the rule, which entitles the defendant in a criminal action to be confronted with the witnesses against him in the presence of the court, and every substantial requirement of the law which authorizes it must be observed. Any real departure from the course prescribed for the taking of the deposition renders the deposition itself objectionable. *People v. Mitchell*, 64 Cal. 85; *People v. Morine*, 54 Cal. 575; *Williams v. Chadbourne*, 6 Cal. 559; *People v. Chung Ah Chue*, 57 Cal. 567; Am. & Eng. Enc. Law, title *Depositions*, subd. 15, note.

"In all criminal prosecutions the accused . . . has a right to be confronted by the witness against him." The accused was confronted by the witness on the former trial, and he had an opportunity of making a cross-examination, that satisfies the requirements of the statutes. The right secured to the accused, it is to be observed, is, "to be confronted with the witnesses against him." This language does not require that the accused shall, in all cases, be confronted with the witnesses against him upon a pending trial of the indictment. The court have held that the statute is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him in any stage of the proceedings upon the same accusation and has had an opportunity of a cross-examination by himself or by counsel in his behalf. *People v. Newman*, 5 Hill, 295. See *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740.

This provision has no application to criminal trials in the state courts for a violation of state laws. This right secured to the accused is limited in its application to citizens of the United States on trial in the Federal courts charged with a violation of the Constitution of the United States or of the laws of Congress.

This clause of the Constitution has been frequently and deliberately interpreted by the Federal courts, and the decisions are so full, emphatic and conclusive that it is only necessary to cite the cases where the rule as stated may be found. *Barron v. Baltimore*, 32 U. S. 7 Pet. 247, 8 L. ed. 674; *Withers v. Buckley*, 61 U. S. 20 How. 84, 15 L. ed. 816; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *People v. Penhollow*, 5 N. Y. Crim. Rep. 41. *People v. Williams*, 35 Hun, 516, 3 N. Y. Crim. Rep. 63.

§ 244. **Exposition of this Subject by New York Court of Appeals.**—A very recent decision by the New York court of appeals has contributed to place this vexed question of depositions taken in criminal cases beyond the reach of further controversy. The functions this species of evidence discharges in the trial of civil causes, is well recognized and perfectly understood, but, the fluctuation of the authorities upon the admissibility of depositions, in criminal causes, has led to discordant rulings, and considerable misapprehension. The importance of the topic, induces the following somewhat extended extract from the opinion from *Mr. Justice Earl* in *People v. Fish*, 125 N. Y. 136:

"It is clearly settled by numerous adjudications that the right of the defendant to be confronted with the witnesses within the meaning of the Federal Constitution and the Bill of Rights was not denied to him. The evidence of the witness was taken in his presence where he had the opportunity to cross-examine him, and where he did in fact cross-examine him, and thus he had all the protection that the Bill of Rights and the Constitution were intended to secure him. This constitutional provision was not intended to secure to the accused person the right to be confronted with the witnesses against him upon his final trial, but to protect him against *ex parte* affidavits and depositions taken in his absence, as was frequently the practice in England at an early day. It was never regarded as an invasion of the fundamental rights of an accused person to read depositions upon his trial, if at some stage of his case he could be confronted with and cross-examine the witnesses to be used against him. In Cooley's Constitutional Limitations (5th ed.) 389, the learned author, speaking of this constitutional provision, says: 'If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there was a

former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the opposite party.' And for this he cites numerous authorities."

The admission of this grade of evidence does not offend against the well known amendment of the Constitution of the United States, which declares that in criminal prosecutions, the accused shall be confronted with the witnesses against him, even the literal construction of this article does not require that the accused should be so confronted upon the trial of the indictment itself, and when the effect of the same language has been considered by the courts, it has been held to be a compliance with what has in this manner been required, that at some stage in the progress of the criminal proceeding the accused should be confronted with the witnesses and afforded the opportunity for their cross-examination, and when he has been so confronted and that opportunity has been afforded to him, that the evidence may afterwards, under certain circumstances certainly, be read upon the trial of an indictment subsequently presented against him. The construction upon this subject has been generally stated to be, "if the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there was a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify." Cooley, Const. Lim. (3d ed.) 318. And that the evidence of a deceased witness, in this manner taken either upon a preceding trial or before the committing magistrate, may be read upon the trial, has been sanctioned by the following authorities: *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110; *People v. Newman*, 5 Hill, 295; *State v. Valentine*, 29 N. O. 225; *Summons v. State*, 5 Ohio St. 325; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740; *Com. v. Richards*, 18 Pick. 437.

It is manifest from the authorities permitting the deposition or evidence of a deceased witness to be read upon the trial of the accused, that it has not been deemed essential that he should be confronted by the witness against him upon the trial itself, but if the evidence be taken in the course of the proceeding in his

presence, and with the right or privilege of cross-examination secured to him, that will be sufficient to allow the deposition to be read in case of the decease of the witness making it, between the time when it may be taken and the time of the trial. And if this article of the Constitution should be held to be applicable to the case, it would not, therefore, exclude the deposition received in evidence on the trial of the defendant.

a. Extreme Importance of the Right.—This subject of depositions received in criminal cases, is freighted with grave constitutional rights. The organic law has guaranteed a well recognized prerogative, the manifest justice of which it was the just pride of the civil law to have established. That law provides that no person shall be convicted of a heinous criminal offense—pilloried at the bar of opinion, deprived of his fair name and reputation, despoiled of his property, outraged in every sensibility by any law, which admits in evidence the irresponsible *ex parte* allegation of his most virulent traducers, under the guise of a deposition. The metropolitan bar has produced no abler judge than James R. Brady and his legal fame is indissolubly linked with a superb protest in a way of a dissenting opinion against this whole enormity of criminal deposition, which we reproduce in connection with this immediate topic. That it is an incisive comment upon the abuses that infest this rule all will admit, and that it is a logical statement of an elementary proposition in the rules of governing natural right all will admit.

b. Views of Mr. Justice Brady.—“Under the law in a criminal action the defendant is entitled: 1. To a speedy and public trial. 2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel, and 3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness, . . . the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found in the state.

“The preliminary examination is in no sense a trial by a jury and

is not designed for that purpose. It is intended to protect the accused from further prosecution if the magistrate is satisfied that none should be had, thus enabling the accused to have a summary hearing before the magistrate and protecting him from a series of burdens which, if innocent, he would otherwise unnecessarily have to bear. It is not exalted in dignity because the right to cross-examine is given in the statute. This is not new in such examinations. The right to cross-examine has always existed. The fatal objection to the use of the deposition is that the accused is not confronted at the trial before the jury impaneled to try him with the witnesses, as required by the constitution and bill of rights. He is confronted with him before the magistrate, who is really only setting the criminal machinery in motion, having no power to pronounce a judgment of which punishment may be predicated. This is not a compliance with the fundamental law and should not be tolerated. There are many reasons why it should be regarded as a dangerous procedure. There are many cases in which the accused, upon such notice as his arrest gives, would, even if innocent, be entirely unprepared to ask any questions arising from many causes which might exist and which the imagination can readily supply.

“The charge is made by a stranger, and having made it departs and cannot be found. He may be actuated by malice or mistaken as to the identity of the transgressor if a crime has been committed; but his testimony is to be received if he cannot be found, and accepted as true without the test of a single element which distinguishes a trial from a mere preliminary examination, and this because the accused has been advised that he may have the privilege of cross-examination. What privilege? The cross-examination of a witness is an art which all lawyers do not possess, while with some it is a power which assists materially in the revelations of the truth and prevents the commission of great wrongs. It is an ally of justice in its administration, and as important if not more important than any other element of jurisprudence. This was well understood by the framers of the constitution, and was, no doubt, one of the considerations which induced the protection guaranteed by the right to be confronted with the witness. It is true that in some states, and it may be said now in this state, the evidence of a deceased witness on a former trial may be read on proof of his death. See *State v. Fitzgerald*, 63 Iowa, 268; *Com-*

v. *Richards*, 18 Pick. 434; *Sullivan v. State*, 6 Tex. App. 319; *State v. Hooker*, 17 Vt. 658; *Kean v. Com.* 10 Bush, 190, 19 Am. Rep. 63; *Walston v. Com.* 16 B. Mon. 15; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Roberts v. State*, 68 Ala. 515; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740. But there a trial has been had and all the rights of such a proceeding secured. The accused has been confronted with the witnesses and has had the opportunity to sift their evidence and assail them if he could do so.

"True, also, it has been held in other states (see *Com. v. Richards*, and *State v. Fitzgerald, supra*), that evidence was received to show what a deceased witness stated on a preliminary examination, and although a constitutional barrier existed similar to ours. The extent to which the authorities in this state have proceeded has only permitted the evidence of a deceased witness upon a former trial of the same indictment to be used. See *People v. Newman*, 5 Hill, 295; *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110. And in the first of these cases it was expressly held that the public prosecutor could not use the testimony given by a witness on a former trial, though he be absent from the state. And it was suggested in that case that the rule which allowed the evidence of a deceased witness to be admitted in civil cases should not be applied to criminal proceedings, and the judgment in the case of *Finn v. Com.* 5 Rand. (Va.) 701, was approved, in which Brockenbrough, J., said that even the death of the witness could not in a criminal case be allowed as a reason for receiving his former testimony.

"Justice Nelson said, in *Crary v. Sprague*, that the testimony of a witness could not be received unless he were dead and his death were affirmatively shown, and proceeded further to say: 'Even diligent inquiry without being able to find the witness is not sufficient, though it is obvious there can scarcely be a shade of difference between the two cases (death and absence) either in principle or hardship.'

"It is true, as remarked by Justice Nelson, that there is scarcely a shade of difference between the principle upon which evidence of a deceased witness is admitted, and that of an absent witness whose presence cannot be secured by diligent search. But it is quite apparent that in allowing the evidence of a deceased witness upon a former trial, where the right of examination was

secured and in the presence of the jury, the inroad upon the constitutional protection was carried as far as it should be. It ought not to be extended to the evidence given upon a preliminary examination of a witness not dead, but not able to be found. *People v. Newman, supra*, sustains this proposition and it should be preserved. There is a wide distinction between a preliminary proceeding and a trial, and the cases to which reference has been made form no precedent for the section under consideration. Its passage is regarded as having been ill-advised and improvident, and its repudiation as a part of the law of the state should be declared at once."

Judge Cooley, whose pre-eminence as a jurist and logician has long since passed beyond the domain of cavil or dispute, sustains the position of *Judge Brady*, in language that admits of no misconception from the sixth edition of his incomparable work on Constitutional Limitations, at page 387 I excerpt the following:

"The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against him; and if any of them be absent from the commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances, but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party. So, also, if a person is on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused; the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most pow-

erful considerations to tell the truth. Not that such evidence is of very conclusive character; it is not always easy for the hearer to determine how much of the declaration related to what was seen and positively known, and how much was surmise and suspicion only; but it is admissible from the necessity of the case, and the jury must judge of the weight to be attached to it."

§ 245. **New York Criminal Code Provisions Stated.**—While disclaiming any attempt to emphasize the provisions of the New York statutes, or to extend to them any extra-territorial effect I cannot ignore the fact that they have been found wonderfully effective in the administration of criminal justice, and have satisfactorily met the test imposed by many years of practical working. They are reproduced in this connection both as affording a practical exposition of the subject under review, and in the hope that their manifest merits may lead to their adoption in other jurisdictions especially in those whose criminal jurisprudence is conspicuously defective in that there is an utter failure to efficiently provide for the rights of one under criminal indictment who wishes to secure the testimony of a material witness without the state.

Chap. 3, "§ 620. When a defendant has been held to answer a charge of a crime, he may, either before or after indictment, have witnesses examined conditionally on his behalf."

"§ 621. When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally."

"§ 622. The application must be made upon the affidavit showing:

- "1. The nature of the crime charged;
- "2. The state of the proceedings in the action;
- "3. The name and residence of the witness, and that his testimony is material to the defense of the action; and,
- "4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial.

* * * * *

"§ 627. On proof being furnished to the officer before whom the examination is appointed, of the service upon the district attorney,

of a copy of the order, and of the affidavit on which it was granted, if no counsel appear on the part of the people, the examination must proceed."

"§ 628. If the district attorney or other counsel appear on the part of the people, and it be shown to the satisfaction of the court or officer, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed."

"§ 629. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information, as prescribed in section 200."

"§ 630. The deposition must be retained by the officer taking it, and filed by him in the office of the clerk of the court without unnecessary delay."

"§ 631. The deposition, or certified copy thereof, may be read in evidence by either party on trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness or infirmity, or of his continued absence from the state."

"§ 632. The deposition cannot, however, be read if it appear that the copy of the order and of the affidavit on which it was founded was not served on the district attorney, as directed, or that the examination was in any respect unfair or not conducted as prescribed in this chapter."

"§ 633. Upon the reading of the deposition in evidence, the same objection may be taken to a question or answer contained therein as if the witness had been examined orally in court."

"§ 634. The attendance of the witness may be enforced, by a subpoena subscribed by the officer, or issued under the seal of the court."

"§ 635. Disobedience to the subpoena, or a refusal to be sworn or to testify, may be punished by the court or officer, as prescribed in section 619."

Chap. 4, "§ 636. When an issue of fact is joined upon an indictment, the defendant may have any material witness residing out of the state, examined in his behalf, as prescribed in this chapter, and not otherwise."

"§ 637. When a material witness for the defendant resides out

of the state, the defendant may apply for an order that the witness be examined on a commission."

"§ 638. A commission is a process issued under the seal of the court and the signature of the clerk, directed to one or more persons, designated as commissioners, authorizing them to examine the witness upon oath, on interrogatories annexed thereto, and to take and return the deposition of the witness, according to the directions given with the commission."

"§ 639. The application must be made upon affidavit, showing :

"1. The nature of the crime charged ;

"2. The state of the proceedings in the action, and that issue of fact has been joined therein;

"3. The name of the witness, and that his testimony is material to the defense of the action;

"4. That the witness resides out of the state."

"§ 640. The application, if made during the term, must be made to the court."

"§ 641. If not made during the term, the application may be made as follows :

"1. When the indictment is pending in a court of oyer and terminer, or in a court of sessions, except in the city and county of New York, to a judge of the supreme court or to the county judge;

"2. When the indictment is pending in the court of general sessions in the city and county of New York, to the recorder or city judge or judge of general sessions, or to one of the judges of the court of common pleas of that city;

"3. When the indictment is pending in a city court, to the recorder or judge of the court in which it is pending."

"§ 642. If the application be made to the court, it may be without notice to the district attorney, unless the court direct notice to be given, in which case it must prescribe the manner of giving the same. If made to one of the officers mentioned in the last section, the application must be upon five days' notice to the district attorney served, with a copy of the affidavit upon which it is founded."

"§ 643. If the court or officer to whom the application is made be satisfied that the witness resides out of the state, and that his examination is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony,

and that the people be permitted to join in the commission, and to examine witnesses in support of the indictment."

"§ 644. If the application for a commission be granted, the court or judge must insert in the order therefor, a direction that the trial of the indictment be stayed for a specified time, reasonably sufficient for the execution and return of the commission."

"§ 645. When the commission is ordered, the defendant must serve upon the district attorney, and the district attorney, if he intend to join in the commission and examine witnesses in support of the indictment, must serve upon the defendant or his counsel, a copy of the interrogatories to be annexed thereto, with a notice to two days of their settlement, before an officer who might have granted the order out of term, as provided in section 641."

"§ 646. The district attorney, and the defendant, may, in the same manner, serve cross-interrogatories, to be annexed to the commission, with the like notice of the settlement thereof."

"§ 647. In the interrogatories, either party may insert any question pertinent to the issue."

"§ 648. Upon the settlement of the interrogatories, the judge must expunge every question not pertinent to the issue, and modify the questions, so as to conform them to the rules of evidence, and when settled, must indorse upon them his allowance, and annex to them the commission."

"§ 640. Unless the parties otherwise consent, by an indorsement upon the commission, the officer must indorse thereon a direction, as to the manner in which it must be returned, and may, in his discretion, direct that it be returned by mail or otherwise, addressed to the clerk of the court in which the indictment is pending, designating his name and the place where his office is kept."

"§ 650. The commissioners, or any one of them, unless otherwise specially directed, may execute the commission as follows :

- "1. They must publicly administer an oath to the witness, that his answers given to the interrogatories shall be the truth, the whole truth, and nothing but the truth;

- "2. They must cause the examination of the witness to be reduced to writing;

- "3. They must write the answers of the witness, as nearly as possible in the language in which he gives them, and read to him each answer as it is taken down, and correct or add to it, until it is made conformable to what he declares the truth;

"4. If the witness decline answering a question, that fact, with the reason for which he declines answering it, as he gives it, must be stated;

"5. If papers or documents are produced before them, and proved by the witness, they must be annexed to his deposition, and be subscribed by the witness and certified by the commissioners;

"6. The commissioners must subscribe their names to each sheet of the deposition, and annex the deposition, with the papers or documents proved by the witness, to the commission, and must close it up under seal and address it, as directed thereon;

"7. If there be a direction on the commission, to return it by mail, the commissioners must immediately deposit it in the nearest postoffice. If any other direction be made, by the written consent of the parties, or by the officer, on the commission, as to its return, they must comply with the direction."

"§ 651. A copy of the last section must be annexed to the commission."

"§ 652. If the commission and return be delivered by the commissioners to an agent, he must deliver it to the clerk to whom it is directed, or to a judge of the court in which the indictment is pending, by whom it may be received and opened, upon the affidavit of the agent that he received it from the hands of one of the commissioners, and that it has not been opened or altered since he received it."

"§ 653. If the agent be dead, or from sickness or other casualty, unable personally to deliver the commission and return, as prescribed in the last section, it may be received by the clerk or judge from any other person, upon his making an affidavit that he received it from the agent, that the agent is dead, or from sickness or other casualty, unable to deliver it, that it has not been opened or altered since the person making the affidavit received it, and that he believes it has not been opened or altered since it came from the hands of the commissioners."

"§ 654. The clerk or judge receiving and opening the commission and return must immediately file it, with the affidavit mentioned in the last two sections, in the office of the clerk of the court in which the indictment is pending."

"§ 655. If the commission and return be transmitted by mail, the clerk to whom it is addressed must open and file it in his office, where it must remain, unless the court otherwise direct."

“§ 656. The commission and return must at all times be open to the inspection of the parties, who must be furnished by the clerk with copies of the same, or of any part thereof, on payment of his fees, at the rate of five cents for every hundred words.”

“§ 657. The deposition, taken under the commission, may be read in evidence by either party on the trial, and the same objections may be taken to a question in the interrogatories, or to an answer in the deposition, as if the witness had been examined orally in court.”

For authorities bearing upon the general subject of depositions, and conditional examination under the practice above outlined, see *People v. Guidici*, 100 N. Y. 507; *People v. Ward*, 4 Park. Crim. Rep. 516; *Mauer v. People*, 43 N. Y. 1; *People v. Restell*, 3 Hill, 289; *Webster v. People*, 92 N. Y. 422; *People v. Vermilyea*, 7 Cow. 369; *People v. Squire*, 3 N. Y. S. R. 194.

§ 246. **Statement of the English and California Rule.**—A deposition taken for the perpetuation of testimony in criminal cases, under 30 & 31 Vict. chap. 35, § 6, may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offense to which it relates—if the deponent is proved to be dead or if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and if the deposition purports to be signed by the justice by or before whom it purports to be taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it is proposed to be read, and that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent. Stephen, Dig. art. 141.

“§ 1335. When a defendant has been held to answer a charge for a public offense, he may, either before or after an indictment or information, have witnesses examined conditionally, on his behalf, as prescribed by this chapter, and not otherwise.

“§ 1336. When a material witness for the defendant is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

“§ 1337. The application must be made upon affidavit, stating—
1. The nature of the offense charged.

2. The state of the proceedings in the action.

3. The name and residence of the witness, and that his testimony is material to the defense of the action.

4. That the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he will not be able to attend the trial.

“§ 1338. The application may be made to the court, or to a judge thereof, and must be made upon three days’ notice to the district attorney.

“§ 1339. If the court or judge is satisfied that the examination of the witness is necessary, an order must be made that the witness be examined conditionally, at a specified time and place, and that a copy of the order be served on the district attorney within a specified time before that fixed for the examination.

“§ 1340. The order must direct that the examination be taken before a magistrate named therein, and on proof being furnished to such magistrate of service upon the district attorney of a copy of the order, if no counsel appear on the part of the people, the examination must proceed.

“§ 1341. If the district attorney or other counsel appear on behalf of the people, and it is shown to the satisfaction of the magistrate, by affidavit or other proof, or on the examination of the witness, that he is not about to leave the state, or is not sick or infirm, or that the application was made to avoid the examination of the witness on the trial, the examination cannot take place; otherwise it must proceed.

“§ 1342. The attendance of the witness may be enforced by a subpoena, issued by the magistrate before whom the examination is to be taken.

“§ 1343. The testimony given by the witness must be reduced to writing, and authenticated in the same manner as the testimony of a witness taken in support of an information.

“§ 1344. The deposition taken must, by the magistrate, be sealed up and transmitted to the clerk of the court in which the action is pending or may come for trial.

“§ 1345. The deposition or a certified copy thereof, may be read in evidence by either party on the trial, upon its appearing that the witness is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the state. Upon reading the deposition in evidence, the same objection may be taken to a question or answer contained therein as if the witness had been examined orally in court.

“§ 1346. Where a material witness for a defendant, under a criminal charge, is a prisoner in the state prison, or in the county jail or a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who is sick, and the provisions of the penal code, commencing with section thirteen hundred and thirty-five, and ending with section thirteen hundred and forty-five, shall, so far as applicable, govern in the application for and in the taking and use of such deposition. Such deposition may be taken before any magistrate or notary public of the county in which the jail or prison is situated; or in case the witness is confined in the state prison, and the defendant is unable to pay for taking the deposition, before the warden or clerk of the board of directors of the state prison, whose duty it shall be to act without compensation. Every officer, before whom testimony shall be taken by virtue hereof, shall have authority to administer, and shall administer, an oath to the witness that his testimony shall be the truth, the whole truth, and nothing but the truth.” Desty, Penal Code of California, chap. 4.

§ 247. **Examination of Witnesses Conditionally for the Accused.**—As previously stated, the right to introduce a deposition in evidence in a criminal prosecution is regulated entirely by statute. In some jurisdictions provision is made for taking depositions for the benefit of the accused beyond the limits of the state, while denying such privilege to the prosecution. *People v. Howard*, 50 Mich. 241; *Newton v. State*, 21 Fla. 53. And it should be observed that where the local law countenances this method of procedure, the provisions of that law must be strictly followed. *People v. Mitchell*, 64 Cal. 85. So it has been held that the prosecution cannot read on the trial a deposition taken before trial, unless the defendant was present when the deposition was taken. *Maurer v. People*, 43 N. Y. 1; N. Y. Code Crim. Proc. § 8, subd. 3; 1 Bishop, Crim. Proc. (3d ed.) § 265. The absence of the prisoner has been held to render the deposition inadmissible. *People v. Restell*, 3 Hill, 289.

A deposition is not entitled to the same weight and credence as oral testimony. *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218. After reading a deposition in evidence, it has been held that the deponent cannot afterwards be examined orally at the same trial (*State v. Kring*, 74 Mo. 612); but the reason for this ruling seems rather unsatisfactory. Rapalje, Crim. Proc. § 279.

PART III.

EVIDENCE FOR THE PROSECUTION.

CHAPTER XXXIV.

EVIDENCE AFFORDED BY THE INDICTMENT.

- § 248. *What Allegations must be Proved and what may be Suggested.*
249. *Phillips "Three Rules" Stated.*
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251. *Rule Observed in Framing.*
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253. *Names of Witnesses must be Indorsed upon Indictment.*
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e. *When Motion to Strike out must be Made.*

§ 248. **What Allegations must be Proved and what may be Suggested.**—In the present chapter it is proposed to consider, 1st. What allegations in an indictment must be proved to support it, and what may be disregarded in evidence; and 2d. With what precision those allegations, which cannot be disregarded in evidence, must be proved.

"1. In order to convict a man of an offense, all the material facts which constitute the offense, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated

upon the indictment; and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence.

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“In considering the subject of surplusage, it must always be remembered that it is a most general rule that no allegation whether necessary or unnecessary, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected.

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“2. It is to be considered with what precision of proof those allegations which cannot be disregarded in evidence must be supported; or, in other words, what is a fatal variance between a material averment in an indictment, and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material provided the substance of the matter be found.

* * * * *

“And with respect to the proof of the offense charged the rule is universal that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus, on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that charged.

* * * * *

“In criminal prosecutions, from the highest offense to the lowest, it is unnecessary to prove the time of committing the offense precisely as laid, unless that particular time is material; and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury.” 2 Russell, Crimes, chap. 2, p. 790, § 3.

By express sanction of the Federal law which may be regarded as a settled principle of the legal polity of this country, the accused has the constitutional right “to be informed of the nature and cause of the accusation.” U. S. Const. 6th Amend. In *United States v. Mills*, 32 U. S. 7 Pet. 142, 8 L. ed. 637, this was construed to mean, that the indictment must set forth the offense “with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;” and in *United States*

v. *Cook*, 84 U. S. 17 Wall. 174, 21 L. ed. 539, that, "every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be by common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Archb. Crim. Pr. & Pl. 291. The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstance.

Where satisfactory evidence is adduced tending to show that the indictment was founded upon incompetent or insufficient evidence a motion to quash is in order. A plea in abatement will not lie, and in fact should never be allowed. *People v. Hulbut*, 4 Denio, 133; *State v. Boyd*, 2 Hill, L. 288; *United States v. Reed*, 2 Blatchf. 435; *Turk v. State*, 7 Ohio, 240; *State v. Dayton*, 23 N. J. L. 49; *Spratt v. State*, 8 Mo. 247; *Rex v. Dickenson*, Russ. & R. 401; *Reg. v. Russell*, Car. & M. 247.

In *People v. Hulbut*, *supra*, the court, per Bronson, Chief Justice, said: "The indictment when presented in due form by the grand jury and filed in court is a record, and, like other records, imports absolute verity. It cannot be impeached unless it be upon motion showing that it was not founded upon sufficient evidence, or that there was any other fault or irregularity in the proceedings."

The grand jury is a constituent part of the court of oyer and terminer, and the control of that court over its proceedings continues, and may be thus exercised after the grand jury has adjourned. *People v. Naughton*, 7 Abb. Pr. N. S. 421, 423, 424, 38 How. Pr. 430; *State v. Cowan*, 1 Head, 280; *Clem v. State*, 33 Ind. 418. The minutes of evidence taken before the grand jury are a part of the records of the court and remain in the custody

of one of its officers. *State v. Little*, 42 Iowa, 51. A court always takes judicial notice of its own records in the cause; and this though not brought before it by affidavit. *Craven v. Smith*, L. R. 4 Exch. 146.

Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defense set up by such pleading. An indictment must contain allegations of every fact necessary to constitute the criminal charge preferred by it. As, in order to make acts criminal, they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they were committed, were done with a particular intent, it is necessary to aver that intention. If it is necessary, in order to support the charge, that the existence of a certain fact should be negatived, that negative must be alleged. *Bradlaugh v. Reg.* L. R. 3 Q. B. 607.

It is also a familiar and elementary principle of criminal pleading that an indictment upon a statute must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient. So where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. *Boyd v. Com.* 77 Va. 52. This rule does not require that the words of the statute should be precisely followed. Words of equivalent import may be substituted, or words of more extensive signification, and which necessarily include the words used in the statute. The decisions are by no means uniform on the subject.

All facts and circumstances stated in the indictment which cannot be rejected as surplusage, must be proved; and all descriptive averments must be strictly proved. 4 Am. & Eng. Enc. Law, title *Criminal Procedure*.

The rule that a descriptive averment must be strictly proved,

has one qualification in cases of homicide and felonious assault. If the averment is that the homicide was caused, or the assault made, in a designated manner, it is not necessary to prove strictly the details of the means averred to have been used in so committing the offense. If the indictment is for murder by poisoning, and, it is averred, by poisoning with a certain drug, the indictment is supported by proof of poisoning with a different drug. East, P. C., chap. 5, § 107. A charge of felonious assault with a staff will be sustained by proof of such assault with another bruising implement, as a stone,—*Sharwin's Case*, cited in 1 East, P. C. chap. 5, § 107,—and a charge of strangling by clasping both hands about the throat, is sustained by proof of strangling by placing one hand over the mouth. *Rex v. Culkin*, 5 Car. & P. 121.

It is necessary to prove matter of description only when the averment, of which the descriptive matter forms a part, is material. Bishop, Crim. Proc. §§ 484, 487; *State v. Copp*, 15 N. H. 212; *State v. Bailey*, 31 N. H. 521; *Rex v. May*, 1 Dougl. 193; *Rex v. Pippett*, 1 T. R. 235; *State v. Dame*, 60 N. H. 479, 49 Am. Rep. 331.

The public prosecutor may insert several counts in the same indictment alleging the offenses distinctly and separately, in various ways, to meet the evidence, and the court will not compel an election between them on the trial. *Nelson v. People*, 5 Park. Crim. Rep. 39. And as was said by Chancellor Walworth, in *Kane v. People*, 8 Wend. 203: "It is every day's practice to charge a felony in different ways in several counts for the purpose of reaching the evidence as it appears on the trial," and "if the different counts are inserted in good faith for the purpose of making a single charge, the court will not compel the prosecution to elect." I am not aware that the correctness of this practice has ever, since that time, been questioned. The modern doctrine is, that the refusal to compel an election in such a case cannot be alleged for error, but is a matter of discretion. *People v. Baker*, 3 Hill, 159; *Cook v. People*, 2 Thomp. & C. 404. See also *Roberts v. People*, 9 Colo. 458; *Corley v. State*, 50 Ark. 305. We will conclude this subject by an extract from the opinion in *Goodhue v. People*, 94 Ill. 37: "If two or more offenses form part of one transaction, and are such in nature that a defendant may be guilty of both, the prosecution will not, as a general rule, be put to an election, but may proceed under one indictment for

the several offenses, though they be felonies. . . . In misdemeanors the prosecution may, in the discretion of the court trying the case, be required to confine the evidence to one offense, or where evidence is given of two or more offenses, may be required to elect one charge to be submitted to the jury; but in cases of felony it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offense, except in cases where the several offenses are respectively parts of the same transaction."

§ 249. **Phillips "Three Rules" Stated.**—Fixed rules must be observed for the discovery of truth. Of these the following are, perhaps, the chief:

"1. The actual commission of the crime itself shall be clearly established.

"2. Each circumstance shall be distinctly proved.

"3. When the leading fact or crime is only to be collected from circumstances, a material variation in these will defeat the effect of the whole. For, as each particular is to have an effect upon the general conclusion, a variation in the circumstances may give a different color to the whole transaction. A system of propositions is only true because each of the propositions of which it is composed is true." Phillips, *Famous Cases*, Circ. Ev. Intro. 35.

§ 250. **Characteristics of an Indictment.**—The indictment is the formal written accusation of one or more persons of a crime or misdemeanor preferred to, and presented upon their oath by, a grand jury. In strict legal parlance it is not so called until the bill has been found "a true bill." 4 Bl. Com. 302; Archb. Crim. Pr. & Pl. 1, 58, 59. The action of the grand jury upon bills of indictment is very important to individuals and the public. On the one hand, the safety, good order and well-being of society are to be affected for good or evil by it, and, on the other, a person should not be causelessly accused of crime. This should be done upon solemn consideration, and for reasonable apparent cause. It may be of great consequence to the accused whether the accusation be well or ill founded. Such bills are not to be treated lightly, but seriously; the action of the grand jury must be based, not merely upon conjecture, suspicion, mere information that they, or a member or members of their body, may know, but upon the testimony of witnesses duly sworn, or other evidence that

comes before them duly authenticated. If a grand juror has knowledge of facts material, he should be sworn as a witness and examined as such. *State v. Cain*, 8 N. C. 352.

The grand jury is an inquisitorial and accusing body; they hear only the evidence on behalf of the prosecution. The finding of the bill of indictment is in the nature of an inquiry or accusation which is afterwards to be tried when the accused will have opportunity to make defense. They must inquire whether there be sufficient cause to call upon the accused party to answer, but such inquiry must be founded upon proper evidence. They do not act in the light of evidence the accused may produce in his behalf upon his trial, but they should be satisfied of the truth of the charge contained in the bill of indictment, so far as the evidence goes. It is essential that witnesses should be sworn and competent. *State v. Fellows*, 3 N. C. 340. It was held when the indictment was found upon the single testimony of an incompetent witness, it should be quashed. And it has been repeatedly held that the indictment should be quashed where the same was found upon the evidence of witnesses not sworn. *State v. Cain*, 8 N. C. 352; *State v. Roberts*, 19 N. C. 540; *State v. Lanier*, 90 N. C. 714; *State v. Ivey*, 100 N. C. 539.

An indictment duly found affords a presumption of guilt. See *Ex parte Ryan*, 44 Cal. 555.

§ 251. **Rule Observed in Framing.**—Mr. Rapalje in his Criminal Procedure at section 87, says: "The general rule in framing an indictment is, that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any other indictment for the same offense. The accused must be apprised of every ingredient of the crime with which he stands charged; and matters material to constitute the crime must be set forth with sufficient fullness to enable him to know with reasonable certainty what he has to meet, and so positively and distinctly as to leave nothing to intendment or implication." *State v. Shirer*, 20 S. C. 392; *People v. Graves*, 5 Park. Crim. Rep. 134; *McConnell v. State*, 22 Tex. App. 354, 58 Am. Rep. 647; *United States v. Goggin*, 1 Fed. Rep. 49; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *State v. Mace*, 76 Me. 64; *Greene v. State*, 79 Ind. 537; *Kearney v. State*, 48 Md.

16; *Hunt v. State*, 9 Tex. App. 404; *Parker v. State*, 9 Tex. App. 351; *Houston v. State*, 13 Tex. App. 595; *Caldwell v. State*, 14 Tex. App. 171.

The same well known author says at section 91, in speaking of disjunctive and conjunctive averments: "When independent clauses in a statute are connected by the conjunction 'or,' the prosecution need satisfy but one of the alternatives. An indictment in such a case may count upon all the clauses by substituting the copulative for the disjunctive conjunction, where the latter is used in the statute; but, at the election of the pleader, the indictment may count upon any one of the alternative clauses which independently define the offense. The use of the disjunctive 'or' is fatal in charging a criminal offense." *Berlinger v. State*, 6 Tex. App. 181; *State v. Fancher*, 71 Mo. 460; *State v. Bregard*, 76 Mo. 322; *State v. Carr*, 6 Or. 133; *State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229; *State v. Price*, 11 N. J. L. 241; *State v. Carver*, 12 R. I. 285; *Hart v. State*, 2 Tex. App. 39; *State v. O'Bannon*, 1 Bail. L. 144; *State v. Flint*, 62 Mo. 393.

An indictment must be so drawn as to exclude any assumption that the indictment may be proved and the defendant still be innocent. *State v. Melville*, 11 R. I. 418; *State v. Smith*, 11 Or. 205.

No principle of criminal pleading is better settled than this: "If the indictment contains one good count, it is sufficient, and this notwithstanding there may be defective counts. *Phelps v. People*, 72 N. Y. 365; *People v. Davis*, 56 N. Y. 95; *Guenther v. People*, 24 N. Y. 100; *Crichton v. People*, 6 Park. Crim. Rep. 363, 1 Keyes, 344, 1 Abb. App. Dec. 470; *People v. Stein*, 1 Park. Crim. Rep. 202; *Baron v. People*, 1 Park. Crim. Rep. 246; *People v. Gilkinson*, 4 Park. Crim. Rep. 26; *LaBeau v. People*, 33 How. Pr. 70; *Reed v. Keese*, 60 N. Y. 616; *Lyons v. People*, 68 Ill. 272; *Latham v. Reg.* 9 Cox, C. C. 516; *Cook v. State*, 49 Miss. 9; *Estes v. State*, 55 Ga. 131; *Adams v. State*, 52 Ga. 565; *Chappell v. State*, 52 Ala. 359; 1 Bishop, Crim. Proc. (2d ed.) § 1015; 3 Whart. Crim. L. (7th ed.) §§ 3208, 3209; *People v. Gonzales*, 35 N. Y. 60; *Wood v. People*, 59 N. Y. 117.

"An indictment containing a count charging murder in the common law form, if sustained by evidence, justifies a conviction for any of the degrees of felonious homicide known to the law. This

has been the well settled law in New York for upwards of half a century. *People v. Enoch*, 13 Wend. 159; *People v. White*, 22 Wend. 167; *Fitzgerrold v. People*, 37 N. Y. 413; *Kennedy v. People*, 39 N. Y. 245; *Cox v. People*, 80 N. Y. 500; *People v. Conroy*, 97 N. Y. 62, 2 N. Y. Crim. Rep. 565. This is the well settled rule in many of the other states. *White v. Com.* 6 Binn. 179; *Fuller v. State*, 1 Blackf. 63; *Wicks v. Com.* 2 Va. Cas. 387; *Mitchell v. State*, 5 Yerg. 340, 8 Yerg. 514; *Com. v. Flanagan*, 7 Watts & S. 415; *Hines v. State*, 8 Humph. 597; *Gehrke v. State*, 13 Tex. 568; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Livingston v. Com.* 14 Gratt. 592; *Com. v. Gardner*, 11 Gray, 438; *People v. Dolan*, 9 Cal. 576; *Com. v. Desmarteau*, 16 Gray, 1; *Green v. Com.* 12 Allen, 170; *Witt v. State*, 6 Coldw. 5; *McAdams v. State*, 25 Ark. 405; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Thompson*, 12 Nev. 140.

“The authorities with scarcely an exception, agree that it is absolutely necessary, in charging a felony, to charge that the act was feloniously done; . . . that the substance of a good common-law indictment should be preserved. If one matter of substance may be dispensed with, another may be, and where is the limit to the innovation? . . . This court has repeatedly held that, in indictments for felonies, the word ‘feloniously’ is substantive in charging the offense,—a word that has a fixed and well defined legal meaning, understood by bench and bar.” *Kaelin v. Com.* 84 Ky. 354, quoting from *Mott v. State*, 29 Ark. 147. See also *Bowler v. State*, 41 Miss. 570.

§ 252. **Former Strictness Relaxed.**—The strictness with which indictments were formerly construed has been considerably relaxed; and it is right that it should be so, while the substantial rights of the accused are preserved. The natural leaning of the mind, observed Lord Kenyon (*Sharwin’s Case*, 1 East, 341), is in favor of prisoners, and in the mild manner in which the laws of this country are administered it has been a subject of complaint, with some, that the judges have given way too easily to formal objections in behalf of prisoners. Lord Hale remarks (2 Hale, P. C. 193) that the strictness required in indictments was grown to be a blemish and inconvenience in the law, and the administration thereof; that more offenders escape by the over easy ear given to exceptions to indictments than by the manifesta-

tion of their innocence, and that the greatest crimes had gone unpunished, by reason of these unseemly niceties. Chitty also remarks (1 Chitty, Crim. L. 171) that in criminal cases, where the public security is so deeply interested in the prompt execution of justice, it seems the minor consideration should give way to the greater, and technical objections be overlooked, and as a practical vindication of this view we will cite the well settled rule that verbal or grammatical inaccuracies, which do not affect the sense, are not fatal. Mere misspelling is not fatal. Whart. Crim. Pl. & Pr. § 273; *Shay v. People*, 22 N. Y. 317; *State v. Gilmore*, 9 W. Va. 641; *State v. Hedge*, 6 Ind. 333. If the sense be clear, nice exceptions ought not to be regarded. And even when the sense of the word may be ambiguous, this will not be fatal, if it is sufficiently shown by the context in what sense the phrase or word was intended to be used. *Rew v. Stevens*, 5 East, 244, 260; 2 Hale, P. C. 193; *State v. Edwards*, 19 Mo. 674; *State v. Halida*, 28 W. Va. 499.

§ 253. **Names of Witnesses must be Indorsed upon Indictment.**—When an indictment is found, the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be indorsed upon the indictment before it is presented to the court. If not so indorsed the court must, upon the application of the defendant, at any time before the trial, direct the names of such witnesses as they appear upon the minutes of the grand jury, to be furnished to him forthwith. It is also the duty of the prosecution to call all material witnesses who were present at the commission of the crime, or any who had knowledge of it. “The commonwealth demands justice, not victims.” *Rice v. Com.* 102 Pa. 408. This rule, however, does not require the prosecution to call respondent’s wife as a witness, in order that she may be cross-examined, even though her name has been indorsed on the information as one of the witnesses for the prosecution. *People v. Wolcott*, 51 Mich. 612.

The rule effecting this subject as laid down in Roscoe is in the following language: “Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment, yet it is usual to do so, in order to afford the prisoner’s counsel an opportunity to cross-examine them; and if the prosecutor would not call them, the judge in his discretion might. The judges, however, have now laid down a rule, that the prosecutor

is not bound to call witnesses merely because their names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defense, if they are wanted for that purpose. If, however, they are called for the defense, the person calling them makes them his own witnesses." See *Scott v. People*, 63 Ill. 508; *Keener v. State*, 18 Ga. 194; *Hill v. People*, 26 Mich. 496; *People v. Bonney*, 19 Cal. 426.

The prosecution can never, in a criminal case, properly claim a conviction upon evidence which expressly or by implication, shows but a part of the *res gestæ*, or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. *Hurd v. People*, 25 Mich. 405, 415.

"Every witness," he said, "who was present at a transaction of this sort, ought to be called; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." *Reg. v. Holden*, 8 Car. & P. 609.

The rules above stated as to the witnesses named on the back of the indictment, in no way compel the state's attorney to place them on the stand. *State v. Cain*, 20 W. Va. 679. All that the rule requires is that such witnesses should be in court. *Reg. v. Cassidy*, 1 Fost. & F. 79. The above paragraph should be read in connection with the case of *Wellar v. People*, 30 Mich. 23, where it was held reversible error in the trial court not to compel the states' attorney to call an eye witness to the homicide whose name was indorsed on the back of the indictment. Another exception is found as to rebutting witnesses. It would be useless because impossible for the prosecution to forecast the nature of the direct testimony or to even surmise the nature and scope of the rebutting evidence. Hence witnesses may be called on rebuttal whose names do not appear on the back of the indictment. *State v. Ruthven*, 58 Iowa, 121.

§ 254. **Evidence of Time and Place.**—The precise time of the commission of an offense need not be stated in the indictment, and hence, the prosecution is not called upon to prove the precise time under the familiar rule, that it is only required to produce such evidence as is necessary to support the indictment. This statement, however, must be taken with this additional qualification that evidence must be produced tending to show that the

offense was committed before the finding of the indictment, and before the statute of limitations was allowed to operate. In other words, this will be sufficient showing, unless time is an indispensable ingredient of the offense. *United States v. Winslow*, 3 Sawy. 337; *Roberts v. State*, 19 Ala. 526; *Irvin v. State*, 13 Mo. 306; *People v. Lafuente*, 6 Cal. 202; *State v. Hanson*, 39 Me. 337; *State v. Beaton*, 79 Me. 314; *Lucas v. State*, 27 Tex. App. 322; *Chandler v. State*, 25 Fla. 728; *Arcia v. State*, 28 Tex. App. 198; Archb. Crim. Pr. & Pl. p. 275; Whart. Crim. L. § 261.

The term employed in designating time, is "on or about," and this is deemed a sufficient particularization; at least it is not so indefinite as to vitiate the indictment. *State v. Harp*, 31 Kan. 498; *State v. Barnett*, 3 Kan. 250; *State v. Tuller*, 34 Conn. 294; *People v. Littlefield*, 5 Cal. 355; *People v. Kelly*, 6 Cal. 210; *Farrell v. State*, 45 Ind. 371; *Hampton v. State*, 8 Ind. 336; *State v. Elliot*, 34 Tex. 148; *Cokely v. State*, 4 Iowa, 479; *Rawson v. State*, 19 Conn. 295.

The only object of alleging time, unless it enters into the nature of the offense, is to show that the prosecution is not barred by the statute of limitations, and that the offense was committed within the political subdivision of the state over which the court has criminal jurisdiction. These principles are elementary and statutory, and need no citation of authorities. *State v. Adams*, 20 Or. 525.

Modern criminal law has utterly abandoned the old theories regarding evidence of the time and place at which an offense was committed. The obvious hardship of requiring the prosecution to prove with absolute accuracy, the hour and minute at which an offense was done, doubtless contributed to this reform. Evidence is conclusive that a hideous crime has been committed. Evidence is equally conclusive as to the perpetrators of this dastardly act. The instrumentalities by which it was accomplished are also shown. Premeditation and fiendish malice are established—every accessory that can deprive the act of palliation or excuse is shown to exist; and yet the inability of the commonwealth to show the exact time of the occurrence, must operate to free the guilty parties. This standing reproach upon the administration of justice happily no longer exists; and the precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding,

except where the time is a material ingredient in the charge. N. Y. Code Crim. Proc. § 280.

So long as the facts and incidents precluded all doubts respecting the identity of the transaction, and so long as it was manifest that the act was recent enough to be subject to prosecution, and that a preliminary examination in regard to it had been had, time is not an ingredient of the offense in any such sense as to make it necessary to charge it according to the truth. The information or indictment may state one time and the proof show a different one without involving an objectionable variance. *Turner v. People*, 33 Mich. 378.

It is a rule that time and place, when and where the crime was committed, must be stated with certainty in the indictment, but it is not necessary to prove them on the trial as stated, unless they are necessary ingredients in the offense. *People v. Stocking*, 32 How. Pr. 48.

Place is immaterial, unless where it is matter of local description, such as the parish, etc., where the house or building is described to be in an indictment for burglary, or for breaking and entering a house, shop, warehouse, or a building within the curtilage, etc., in which cases the local description must be proved as laid. Upon an indictment for treason or conspiracy, if you prove one good overt act in the county where the venue is laid, you may prove the others to have taken place in any other part of the country. And upon an indictment against an accessory before or after the fact, he may be indicted, in any place and before any court where his principal may be tried, no matter where the offense of the accessory was committed. 1 Archb. Crim. Pr. & Pl. p. 119.

§ 255. **Quashing Indictment Founded on Illegal Evidence Given before the Grand Jury.**—An indictment will be quashed, if it plainly appears to the court to have been found upon wholly incompetent or insufficient evidence; but if the jury acted upon legal testimony reaching the whole case, the court will not weigh its sufficiency.

The jealousy with which the early law guarded the secrets of the grand jury room, has largely disappeared. The sacramental character of that august body is very imperfectly recognized at the present day. The theory that the proceedings before this body are beyond the scrutiny or condemnation of court or coun-

sel, is a foolish pretense that is very generally abandoned. Malice, corruption and ignorance frequently combine to impress upon the proceedings of this body, the tyrannical and oppressive functions of the Star Chamber and the Council of Ten. And to say or even intimate that where corrupt practices exist, there is no method open for their proper disclosure is simply to insist that our criminal law is crippled with a hideous deformity.

In *Burdick v. Hunt*, 43 Ind. 381, it is said there is no sufficient reason why the prosecuting attorney may not be called upon in a court of justice to disclose any evidence given or proceedings had before a grand jury. And the following authorities are to the effect that generally the evidence of grand jurors is competent whenever it is necessary to ascertain who was the prosecutor (*Sikes v. Dunbar*, 2 Wheat. Sel. N. P. 1091; *Huidekoper v. Cotton*, 3 Watts, 56) or what was the issue and what the testimony of the witnesses before a grand jury in a given case. *Thomas v. Com.* 2 Rob. (Va.) 795; *State v. Offutt*, 4 Blackf. 355; *State v. Fassett*, 16 Conn. 457; *Com. v. Hill*, 11 Cush. 137; *State v. Broughton*, 29 N. C. 96, 45 Am. Dec. 507; *Way v. Butterworth*, 106 Mass. 75; *Burdick v. Hunt*, *supra*.

The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations (*People v. Shattuck*, 6 Abb. N. C. 34; *Com. v. Mead*, 12 Gray, 167, 71 Am. Dec. 741) because this cannot serve any of the purposes of justice.

In *State v. Froiseth*, 16 Minn. 298, it was conceded by the attorney general, and the court concurred, that where the grand jury required an accused person to be brought before them and testify touching the accusation the indictment should be set aside, although in that case the indictment was not found solely upon the testimony of the accused. In *People v. Briggs*, 60 How. Pr. 17, the court, Osborn, J., held that an indictment should be quashed where the defendant's wife was called as a witness against him by the grand jury, for the reason that this was a substantial error, and it was doubtful whether the grand jury would have found an indictment without the wife's testimony. *United States v. Farrington*, 5 Fed. Rep. 343, 2 Crim. L. Mag. 525.

The proceedings of grand juries cannot ordinarily be disclosed, but this rule is not to be carried to the extent of obstructing justice or of creating wrong and hardship. A court may inquire into the evidence upon which a grand jury found an indictment, and if such evidence is plainly illegal and incompetent should quash the indictment. *People v. Restenblatt*, 1 Abb. Pr. 268; *United States v. Farrington*, *supra*. But see *contra*, *State v. Fowler*, 52 Iowa, 103, 2 Crim. L. Mag. 45.

As the grand jury is an informing and accused body, which makes its investigations and holds its deliberations in secret, and is irresponsible for its official action upon matters of fact, except before the tribunal of public opinion, it is very important that its powers duties and methods of procedure should be well understood, and be strictly confined within the conservative and salutary limits imposed by law, which experience has shown to be necessary to subserve the public good, and to accomplish a just and impartial administration of the criminal law.

Mr. Justice Field, in an able and well considered charge of a grand jury in California (5 Am. L. J. 259), very clearly defined his views as to the powers and duties of grand juries in the Federal courts. He said, in substance, that their investigations are limited to such offenses as are called to their attention by the court, or submitted to their consideration by the district attorney; or such as may come to their knowledge in the course of their investigations of matter brought before them, or from their own observations, or such as may be disclosed by members of the body. With the above exceptions he was opinion that all criminal prosecutions should be commenced by preliminary examinations before a magistrate, where a person accused of crime may meet his accuser face to face, and have an opportunity for defense, as this method of procedure affords the citizen the greatest security against false accusations from any quarter. He also, in strong terms, directed the grand jurors not to allow private prosecutors to intrude themselves into the grand jury room and present accusations. On this subject he dwelt at some length and referred to high authority, urging the importance of securing grand juries against outside influences and improper interferences, which, if allowed, "would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies." In this connec-

tion he quoted the Act of Congress entitled "An Act to Prevent and Punish the Obstruction of the Administration of Justice in the Courts of the United States." Rev. Stat. §§ 5404, 5405.

Investigations before grand juries must be made in accordance with the well established rules of evidence, and they must have the best legal proof of which the case admits. In this respect they are judicial tribunals. The prosecuting officer is presumed to be familiar with the rules of evidence, and it is his duty to take care that no evidence is received by the grand jury which would not be admissible in a court upon the trial of a cause. 1 Whart. Crim. L. § 493.

As to how far grand jurors may be allowed or compelled to testify as to proceedings before their body, is a question upon which there is some diversity of decisions in the courts. By the policy of the law grand juries act in secret, and, with the view of sustaining that policy, it is prescribed that a grand juror shall, among other things, swear that "the state's counsel, your fellows, and your own, you shall keep secret." The principal ground of that policy is to inspire the jurors with a confidence of security in the discharge of their responsible duties; and secrecy as to the actions and the opinions of jurors upon matters before them must ever remain inviolable.

It follows from the foregoing review that an indictment should be quashed when it appears by affidavit that it was found by the grand jury without adequate evidence to sustain it. *People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Hyler*, 2 Park. Crim. Rep. 570. If any illegal evidence has been introduced before the grand jury which bears in the smallest degree upon the final result of the deliberations, it cannot properly be disregarded, and the indictment should be set aside. *Worrall v. Parmelee*, 1 N. Y. 519, 49 Am. Dec. 350; *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334; *Baird v. Gillett*, 47 N. Y. 186. Since the decision of the case of the *People v. Briggs*, 60 How. Pr. 17, deciding the incompetency of the wife as a voluntary witness against the husband (per Judge Osborn), the same question has been decided the same way in the case of *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440, reported since Judge Osborn's decision. See also *People v. Crandon*, 17 Hun, 490, which holds directly that the wife is not a competent witness in a criminal action against her husband. Any defect which, in any stage of a crim-

inal proceeding will vitiate the indictment, may be taken advantage of by plea in abatement. 2 Hale, P. C. 236. Any defect or irregularity appearing upon the face of the indictment or upon some matter of fact extrinsic of the record, may be cured by plea in abatement to quash. 1 Bishop, Crim. Proc. § 416.

Upon a motion to quash an indictment, affidavits cannot be read to contradict or explain the allegations in the indictment without the consent of the district attorney, and common law proof is required to sustain or avoid the allegations in an indictment, unless by consent of the district attorney other proof is accepted. *People v. Clews*, 57 How. Pr. 245.

In 1 Wharton's American Criminal Law, § 520, it is said: "It is error to quote on matters not apparent in the indictment, or caption, extrinsic matter being proper for the defense only on trial by jury." In a note to this section he says: "By consent, however, extraneous matter may be brought in." Bishop, in 1 Criminal Proceedings, § 763, admits this to be the general rule, but says: "The better doctrine is, that the court in its discretion may go outside of the indictment and record and try the whole question on affidavits."

This is the substance of his text for what he styles the "better doctrine."

He cites on supporting this "better doctrine," *State v. Batchelor*, 15 Mo. 207; *State v. Wall*, 15 Mo. 208; *State v. Cain*, 8 N. C. 352; *Reg. v. Hearn*, 4 Best & S. 94, 9 Cox, C. C. 433, 10 Jur. N. S. 724; *United States v. Shepard*, 1 Abb. U. S. 431.

"I have examined these cases carefully and they do not authorize, in my opinion, or sustain the views of Mr. Bishop. Nor are they authority that affidavits can be received when objected to by the district attorney." Grosvenor, J., in *People v. Clews*, *supra*.

There are various valid reasons which, when properly urged, will affect the quashing of an indictment. Thus uncertainty is frequently alleged as a reason (*State v. Robinson*, 29 N. H. 275; *Murphy v. State*, 106 Ind. 96; *State v. Roach*, 3 N. C. 352) or want of jurisdiction. *State v. Benthall*, 82 N. C. 664. And duplicity constitutes a sufficient cause. *Knopf v. State*, 84 Ind. 316.

Under the New York Code of Criminal Procedure, § 323, this last objection is made available by demurrer. The rules relating to this subject of quashing an indictment filiate more particularly with practice methods and will receive no further notice in this connection.

§ 256. **When Evidence Introduced to Sustain Indictment may be Stricken out.**—Where as it actually happens in many cases counsel offer certain irrelevant testimony under a promise to subsequently connect it with some vital fact in issue, and the court with this promise in view admits the evidence, it may be stricken out on motion, if the event discloses a failure to so connect it. *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172.

This rule, it must be borne in mind, is of doubtful propriety in criminal cases: "It must be apparent that such testimony, having once gone to the jury, its impression would necessarily, to some extent, remain in their minds, though they were ordered to discard it; and in a case of circumstantial evidence, it is next to impossible to say how far that impression exercised its influence in supplying any defect which might have arisen, or in solving any doubt in their minds on the general state of the evidence. A prosecuting officer in behalf of the state, in his zeal for a conviction, should never overlook the fact that the interests in society and the vindication of the law require at his hands as much the protection of the innocent as the conviction of the guilty. Evidence of this character, in cases involving life, should never be proposed by him, unless he is morally certain that he can make good his promise of connecting the defendant with the matter; there should be no room for doubt, where, he could have ascertained in advance the existence or non-existence of defendant's connection with the proposed evidence." *Marshall v. State*, 5 Tex. App. 273.

A contrary doctrine is held in regard to civil cases. *Joslin v. Grand Rapids Ice & C. Co.* 53 Mich. 323.

As sustaining the doctrine of *Marshall v. State*, *supra*, see *State v. Daubert*, 42 Mo. 242; *Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219; *Blizzard v. Applegate*, 77 Ind. 516; *Hopt v. People*, 114 U. S. 488, 29 L. ed. 183; *Specht v. Howard*, 83 U. S. 16 Wall. 564, 21 L. ed. 348; *Davis v. Peveler*, 65 Mo. 189; *Goodnow v. Hill*, 125 Mass. 589; *Dillin v. People*, 8 Mich. 369; *Abbott*, Trial Brief, 52, citing *Mechelke v. Bramer*, 59 Wis. 57; *Piper v. White*, 56 Pa. 90; *Hall v. Patterson*, 51 Pa. 289; *Bilberry v. Mobley*, 21 Ala. 277; *Van Buren v. Wells*, 19 Wend. 203; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Carnes v. Platt*, 15 Abb. Pr. N. S. 338, 4 Jones & S. 361, affirmed in 59 N. Y. 405.

It frequently occurs in the trial of a cause civil or criminal, that a cunning and discriminating witness will attempt to foist upon the record an answer that is in no sense responsive to the question asked. Under such circumstances either party may object to the relevancy of the evidence and ask that it be stricken out. Such a request should always be granted. *Greenman v. O'Connor*, 25 Mich. 30; *Lansing v. Coley*, 13 Abb. Pr. 272; *Kingsbury v. Moses*, 45 N. H. 222.

a. Examination of the Principle Affecting this Right to Exclude.—We have elsewhere discussed the regulations in vogue regarding “offers to prove.” It is perhaps unnecessary to add that where there is a failure to connect the testimony elicited with any of the issuable propositions of the case the testimony that has been received, upon the theory that it is relevant, should be stricken out when it appears that it sustains no legitimate relation to the proof required. Upon this subject there is suggestive comment in several California cases.

At a recent trial in that state the defendant moved to strike out certain evidence. The court denied the motion upon the statement of the district attorney that he would show its relevancy by other evidence, but gave the defendant leave to renew his motion at a subsequent stage of the trial. The district attorney failed to introduce the other evidence, and the defendant renewed his motion, which was granted. It was argued that the court ought to have granted the motion in the first instance, and that when the evidence was finally stricken out, a caution concerning it should have been given to the jury. But it is usual and quite proper for a court to accept the statement of a reputable counsel, and upon the faith of such statement to temporarily refuse to strike out evidence that has been introduced, or to admit evidence offered. And if the defendant had desired any caution to the jury; he should have asked for it. The failure of a court to charge on any point usually proceeds from inadvertence, and the law casts upon the parties the duty of calling the judge’s attention to the matter by a formal request for an instruction in relation to it. *People v. Hawn*, 44 Cal. 96; *People v. Rodondo*, 44 Cal. 541; *People v. Ah Wee*, 48 Cal. 237; *People v. Collins*, 48 Cal. 277; *Chamberlain v. Vance*, 51 Cal. 84; *Williams v. Hartford Ins. Co.* 54 Cal. 449; *People v. McLean*, 84 Cal. 480.

b. Views of Justice McGowan and Others.—In further

vindication of the position taken of the text, I will refer to the case of *State v. James*, 34 S. C. 49, where the question involved was a subject of an extended review. As usual in cases of this character the counsel for the defense urged that the testimony complained of had been heard by the jury, that the evil effects inherent in erroneous evidence must have left a prejudicial impression which the mere instruction to disregard could not remove. *Mr. Justice McGowan* in refusing to grant a new trial on the ground of the admission of erroneous evidence, employs the following vigorous language: "We know that the law is very tender of human life, but considering the character of the testimony in connection with the whole case, we cannot hold that the bare circumstance of the evidence having been heard by the jury, should vitiate the whole proceeding. The jury was instructed not to consider it, and we must assume that they were what the law directs, sensible, intelligent men, entirely without bias. It is true, there are extreme cases in some of our sister states, in which the courts have gone very far in the opposite direction; but there is no such case in this state. As we think, the proper rule in such cases is laid down in 2 *Graham & Waterman*, New Trials (2d ed.) page 633, where, in commenting upon the case of *Craddock v. Craddock*, 3 Litt. (Ky.) 78, the learned author says: 'But so rigid a discipline would be injudicious. A more moderate and less exacting course has been found to answer every purpose. In the progress of a warmly contested suit, exceptionable testimony will occasionally slip in, despite of the greatest care of the court and counsel. If, therefore, the bare circumstance that such evidence had gone to the jury, vitiated all the proceedings, scarcely a verdict in any case of importance would stand. So that it is, on the whole, the part of the wisdom for courts, to regard not so much the fact that improper evidence has been admitted, as the influence it may have had on the result. We may, then, lay it down as a settled rule, that if the verdict is undeniably correct, a new trial will not be granted, even in case of the admission of improper evidence.' " Notwithstanding the general propriety of this view it must be borne in mind that striking out testimony that has been improperly allowed in a criminal case, and cautioning the jury not to be influenced by it, does not necessarily obviate its effects. *People v. Wolcott*, 51 Mich. 612.

Though the court know not, as seldom can it know, that the needful connecting proof will be forthcoming, may it not rest for awhile on the assertion of reputable counsel of his expectation that he can produce it? That a court may base its action upon the avowals and declared purposes of counsel is shown by *Dunn v. People*, 29 N. Y. 523. It seems to us that it would too much hamper the trial courts in their proceedings, if they are much restricted in the exercise of a discretion rested in them, in such case, for the convenience and dispatch of business, and often for a proper understanding and appreciation of the testimony. As was said by Nelson, *Ch. J.*, in a kindred matter, in *Morris v. Wadsworth*, 17 Wend. 103, the question must always depend so much upon the exercise of a sound discretion that it would be unsafe to lay down any general rule for the disobedience of which an exception should be allowed. See also *Flynn v. Murphy*, 2 E. D. Smith, 378; *Philadelphia & T. R. Co. v. Stimpson*, 39 U. S. 14 Pet. 463, 10 L. ed. 543, per Story, *J.* Truly it is at times a delicate discretion, to be used with sound judgment and great care for the case of the prisoner, lest he be jeopardized with the jury by testimony that may never properly have a place in their consideration. And it may be well often to doubt whether the zeal of counsel does not lead to an expectation of forthcoming connecting testimony, when it does not exist.

Tilghman, *Ch. J.*, in *Stewart v. Huntingdon Bank*, 11 Serg. & R. 267, said: "It has grown into a habit, within these few years for counsel to propose a chain of evidence, the first link of which depended on those which follow, and would not be competent without them." He remarks the incident dangers, and adds: "The court should, therefore, keep a wary eye on proceedings of this kind, and take care to instruct the jury to pay no regard to the evidence which they have heard whenever the condition on which it was introduced is not complied with." At a much more recent date it was decided, that if improper evidence is given, tending to inflame the damages, and it is not struck out at or before the close of the testimony, so that counsel shall not be allowed to refer to or dwell upon it in their address to the jury, it is altogether too late to cure the mistake by directing the jury to disregard it in the charge. *Pennsylvania R. Co. v. Butler*, 57 Pa. 335. Whenever the incompetent testimony received is of such a character as to inevitably tend to prejudice the minds of the

jurors, the error is not cured by the court telling them, after the argument has closed, not to consider it. *Huntingdon & B. T. M. R. & C. Co. v. Decker*, 82 Pa. 119. The rule is settled that, in civil cases, if incompetent testimony is not withdrawn before the argument, and so that it be reasonably certain that its poison has not infected the whole case, the error in the receiving of it is not cured. What then ought to be the rule when life or liberty is at stake?

If it has become a custom in capital cases to receive incompetent evidence, on the faith that it will become competent before the trial closes, would it not be well to abandon it? When such evidence has been made competent by subsequent proofs, there will not be a reversal because it was prematurely received. If withdrawn at a time and in a way that makes it certain the accused was not prejudiced, the error would be cured. But if its tendency was to affect the credibility of a witness, or to establish the prisoner's guilt, who can say it was effaced from the juror's mind. Much pains is taken to get an unbiased and pure mind, as white paper, on which to write the legal evidence, and it should not be purposely blotted with irrelevant matter. Once fouled, it is hard to clean.

New York holds to the same ruling. It has long been well settled in the courts of that state that an error in the reception of illegal evidence is not cured by a direction to disregard the evidence. *Erben v. Lorillard*, 19 N. Y. 302; *Furst v. Second Ave. R. Co.* 72 N. Y. 547; *Coleman v. People*, 58 N. Y. 561; *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 341; *Stokes v. People*, 53 N. Y. 184, 13 Am. Rep. 492; *Worrall v. Parmelee*, 1 N. Y. 519, 49 Am. Dec. 350; *Newman v. Goddard*, 3 Hun, 72; *Irvine v. Cook*, 15 Johns. 239; *Penfield v. Carpenter*, 15 Johns. 350; *Vandevoort v. Gould*, 36 N. Y. 639; *People v. Gonzales*, 35 N. Y. 49.

c. Prejudice must have Resulted or Incompetent Evidence will Stand.—When a fact is conclusively proved, by competent evidence, so that the court can see that no prejudice or injury could possibly have resulted from the admission of incompetent evidence to prove the same fact in another stage of the case, its admission will not be cause for interfering with the result, but the rule is to be cautiously applied, especially in criminal cases. *Williams v. Fitch*, 18 N. Y. 546; *People v. White*, 14

Wend. 111; *Erben v. Lorillard*, 19 N. Y. 299. The true and the only rule that can be sustained upon principle is, that the intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innocuous. *Vandevoort v. Gould*, 36 N. Y. 639; *People v. Gonzales*, 35 N. Y. 49. It is not enough that the court sitting in review of the judgment may be of the opinion that the result ought to, and probably would, have been the same if the objectionable evidence had been excluded, and especially ought not such a presumption avail to cure an error upon a criminal trial.

The rule laid down in *Footte v. Beccher*, 78 N. Y. 158, is as follows: "An error in receiving incompetent evidence, if properly excepted to, can only be disregarded when it can be seen that it did no harm. If the evidence is slight or irrelevant, or if, without it, the fact is conclusively established by other evidence, it may be disregarded, because it could not have injured the other party."

A just application of the law will not allow an indictment to stand unless warranted by the evidence. *People v. Morrison*, 1 Park. Crim. Rep. 625; *Reynolds v. People*, 41 How. Pr. 179; *People v. Bransby*, 32 N. Y. 525; *People v. Dohring*, 59 N. Y. 374; *Walter v. People*, 50 Barb. 144. And in Alabama the admission of illegal or irrelevant evidence against the objection of a defendant, on trial for a criminal offense, is a reversible error, unless it affirmatively appears that no injury resulted therefrom. *Maxwell v. State*, 89 Ala. 164; *Marks v. State*, 87 Ala. 99; *Vaughan v. State*, 83 Ala. 55; *Mitchell v. State*, 60 Ala. 26.

d. When Incompetent Evidence is not Deemed Harmless.—When incompetent evidence may have a tendency to arouse the prejudices of the jury it cannot be deemed harmless. *Anderson v. Rome, W. & O. R. Co.* 54 N. Y. 334. And this rule applies in both civil and criminal cases, and with even greater force in the latter than in the former. *Baird v. Gillett*, 47 N. Y. 186; *Worrall v. Parmelee*, 1 N. Y. 519, 49 Am. Dec. 350; *Starin v. People*, 45 N. Y. 341; *Ross v. Ackerman*, 46 N. Y. 210; *Osgood v. Manhattan Co.* 3 Cow. 612, 15 Am. Dec. 304; *Marquand v. Webb*, 16 Johns. 89; *Rosenweig v. People*, 63 Barb. 635; *People v. Haynes*, 38 How. Pr. 369; *People v. Pierpont*, 1 Wheel.

Crim. Cas. 139; *People v. Hopson*, 1 Denio, 574; *Cary v. Hotailing*, 1 Hill, 316, 37 Am. Dec. 323; *Hall v. People*, 6 Park. Crim. Rep. 671; 1 Greenl. Ev. §§ 51, 52, 448.

But when such incompetent evidence is offered, the objection should be fully stated. After this has been done and the objection argued, overruled, and the evidence received; the attention of the court again called to its objectionable character by a motion to strike it out, and exception to the adverse rulings duly taken, counsel may well desist from renewing fruitless objections. *State v. Graves*, 17 Colo. —.

e. When Motion to Strike out must be Made.—It is not too late after argument is closed, for the party who has given improper evidence, to call upon the judge to charge the jury, that it was illegally admitted and should be disregarded by them. *Abbott, Trial, Brief*, § 718.

CHAPTER XXXV.

BURDEN OF PROOF.

- § 257. *Preliminary View.*
- 258. *Burden of Proof Rests upon the Prosecution.*
- 259. *Never Shifts but is with Prosecution throughout.*
- 260. *Where a Fact is Peculiarly within the Knowledge of a Party.*
- 261. *When Accused must Establish the Defense of Insanity.*
- 262. *Proving a Negative.*
- 263. *A Prima Facie Case will not Rebut the Presumption of Innocence.*
- 264. *Burden of Proof in Statutory Crimes.*
- 265. *The Rule Deduced from the Celebrated Stokes Case.*
- 266. *Views of Sir James Stephen.*
- 267. *Summary of the Conclusion Reached.*

§ 257. **Preliminary View.**—It is an elementary principle of criminal jurisprudence, a principle firmly imbedded in the organic law of every free state and vindicated by statutory guarantee as well as by innumerable judicial decisions, that every criminal, however hideous his alleged crime, or however debauched and fiendish his character, may require that the elements of that crime shall be clearly and indisputably defined by law, and that his commission of and relationship to the alleged offense shall be established by legal evidence delivered in his presence and before a jury of his peers. Until accorded this right, he may safely flaunt and boast his immunity from punishment, and his right to invoke the protection of the legal presumption of innocence which the law in its leniency extends to every person. This principle is vindicated in countless decisions that it is mere pedantry to cite. Its latest exposition perhaps is from *Chief Judge Ruger* of the New York court of appeals in *People v. Plath*, 100 N. Y. 590. This is a valuable principle that ought never to be drawn in question.

§ 258. **Burden of Proof Rests upon the Prosecution.**—Independent of any modification by statute to rebut the presumption of innocence, the burden of proof rests upon the prosecution in every kind of criminal action or proceeding; or, as otherwise

expressed by an eminent author, "the burden of proof is always on the party who asserts the existence of any fact which infers legal accountability." Wills, Circ. Ev. 145, Rule 2.

Guilt must be established by sufficient evidence. There has been various formulæ in use, such as "beyond a reasonable doubt," "fully satisfied," "satisfied, etc." The first expression is said to be inexplorable. Probably as sensible a definition as can be found, was expressed by Baron Parke: "The doubt, however, must be not a trivial one such as speculative ingenuity may raise, but a conscientious one, which may operate upon the mind of a rational man, acquainted with the affairs of life." *Reg. v. Tarwell Aylesbury Special Assizes*, 1845, cited in Wills, Circ. Ev. 194; Bailey, *Onus Probandi*, p. 442.

Where the crime consists of several degrees, this burden exists as to the degree charged, and as to every fact necessary to constitute that degree; and that, if, upon the whole evidence, including that part of the defense, as well as that of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt; and this is true with respect to the degree of the crime charged, and with reference to every essential requisite of that degree; and that in all these respects the burden is never shifted from the prosecutor to the prisoner. *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Brotherton v. People*, 75 N. Y. 159; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *People v. Conroy*, 97 N. Y. 62-75, 2 N. Y. Crim. Rep. 565; *People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480.

"The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove, beyond a reasonable doubt, the offense charged in the indictment, and if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. This results not only from the well established principle that the presumption of evidence is to stand until it is overcome by proof but also from the form of the issue in all criminal cases tried on the merits, which being always a general denial of the crime charged necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient which the law requires in order to constitute an offense. If the act charged is justifiable or excusable, no criminal act has

been committed and the allegations in the indictment are not proved. This makes a broad distinction in the application of the rule as to the burden of proof to civil and criminal cases. In the former, matters of justification or excuse must be specifically pleaded in order to be shown in evidence, and the defendant is therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof, while in the latter all such matters are open under the general issue, and the affirmative, namely, proof of the crime charged, remains in all stages of the case upon the government." *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410. Continuing, the learned judge remarks—and this is the qualification of the general rule: "There may be cases where a defendant relies on some distinct, substantive ground of defense to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance) in which the burden of proof is shifted upon the defendant." In fact, we know of no case where it has been held that the rule that "the burden of proof never shifts from the state," has been held to extend further than proof of the case as charged in the indictment; nor of any case where, if the defendant seeks to excuse himself from liability on account of some substantive, distinct matter, he has not been held to have the laboring oar, and the *onus* of making good his issue thus presented.

Much has been written, and there is much hypercriticism in the discussion of the propositions that in criminal prosecutions the *onus* is never shifted, and that the presumption of innocence accompanies the prisoner through all the stages of his trial. These are valuable canons of the law, but, like most other general rules, are subject to some modifications in their application, the observance of which is essential to the good order and well-being of society. *Braswell v. State*, 2 Crim. L. Mag. 32.

"All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal.' In the decision of a criminal case, there must be more than a preponderance of evidence. It would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influ-

ence their minds in the important affairs of life. But the evidence must entirely satisfy the jury of the guilt of the defendant before they can convict. If the jury are not entirely satisfied, they should acquit." *People v. Levine*, 85 Cal. 39.

§ 259. **Never Shifts, but is with Prosecution throughout.**—"Properly it (the term 'burden of proof') is applied only to a party affirming some fact essential to the support of his case. Thus used it never shifts from side to side during the trial. Loosely used . . . it is confounded with the weight of evidence, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome, and in this indiscriminate use of the term 'burden of proof,' much of the apparent conflict in the cases has its origin. For, after all, the test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities." *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53.

The true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment. *Com. v. McKie*, 1 Gray, 64, 61 Am. Dec. 410; *Com. v. York*, 9 Met. 125, 43 Am. Dec. 373; *Com. v. Webster*, 5 Cush. 305, 52 Am. Dec. 711; *Com. v. Eddy*, 7 Gray, 584.

"The proposition . . . that the burden of proof never shifts on the defendant at any stage of the proceedings is not strictly correct. It is true the state must prove the offense charged beyond a reasonable doubt. The statute then casts the burden of proof as to matters of mitigation or excuse upon the defendant. The public prosecutor cannot be compelled to search for and put in evidence all the facts connected with the transaction, or exculpatory facts in the prisoner's favor. The policy of the law, as evinced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, it devolves upon the defendant to produce in evidence such matters of mitigation, justification, or excuse, if any such exist, as may tend to explain his action and show the necessity therefor; otherwise a verdict of guilty must necessarily be returned

against him. He is not required by the statute however, to prove such circumstances beyond a reasonable doubt or to the extent of satisfactorily establishing his defense. He is only required to prove the same as any other facts are required to be proved; and if the matters relied on be supported by such proof as would produce a reasonable doubt in the minds of the jury as to the guilt of the prisoner, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal." *Alexander v. People*, 96 Ill. 96; *Kent v. People*, 8 Colo. 563.

§ 260. **Where a Fact is Peculiarly within the Knowledge of a Party.**—But where a fact is peculiarly within the knowledge of one of the parties, so that he can have no difficulty in showing it, the presumption of innocence or of acting according to law, will not render it incumbent upon the other side to prove the negative; but the party who must know the fact is put to the proof of it. *United States v. Hayward*, 2 Gall. 485.

It was said by Abbott, *Ch. J.*, that the party was called on to answer for an offense against the excise laws, sustains not the slightest inconvenience from this general rule, for he can immediately produce his license; whereas if the case is taken the other way, the informer is put to a considerable inconvenience. *Harrison's Case*, cited in Paley, *Convictions* (2d ed.) 45, *note*. See also *Rex v. Smith*, 3 Burr. 1476. The same rule has been frequently acted upon in civil cases. Thus, on an action against a person for practicing as an apothecary, without having obtained a certificate, the proof of the certificate lies upon the defendant, and the state need not give any evidence of his practicing without it. *Apothecaries Co. v. Bentley*, Russ. & M. 159; *People v. Nyce*, 34 Hun, 298.

The law is well settled that "in an action for a penalty given by statute, it was not necessary for the prosecutor to disprove any qualification; that in such case the *onus probandi* lay upon the defendant." *People v. Quant*, 2 Park. Crim. Rep. 410. Thus, on an indictment for a breach of the excise law, evidence of a sale of spirituous liquors by the defendant, in less quantities than five gallons, establishes, *prima facie*, the offense. It is in such case for the defendant to show that he has the license required by law. *Smith v. Joyce*, 12 Barb. 21.

§ 261. **When Accused must Establish the Defense of Insanity.**—Crimes can only be committed by human beings who are in a condition to be responsible for their acts; and upon this general proposition, the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it; and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and, if a reasonable doubt exists as to whether the prisoner is insane or not, he is entitled to the benefit of the doubt, and to an acquittal. *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Walker v. People*, 88 N. Y. 81; *Casey v. People*, 31 Hun, 158; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *People v. Schruyver*, 42 N. Y. 1, 1 Am. Rep. 480; *Walter v. People*, 32 N. Y. 147; *O'Brien v. People*, 48 Barb. 274; *People v. Robinson*, 1 Park. Crim. Rep. 649; *State v. Hoyt*, 46 Conn. 330; *State v. Lawrence*, 57 Me. 574; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Dacey v. People*, 116 Ill. 555; *State v. Crawford*, 11 Kan. 32.

§ 262. **Proving a Negative.**—The burden of proving the defendant's guilt may require the prosecution to prove a negative. *Com. v. Samuel*, 19 Mass. 103; *State v. Morphy*, 33 Iowa, 270; *State v. Hirsch*, 45 Mo. 429; *State v. Wilbourne*, 87 N. C. 529. But where the fact is peculiarly within the knowledge of one party rather than the other, the burden of proof may be imposed on the one having the means of proof. *State v. Arnold*, 35 N. C. 184; *Pounders v. State*, 37 Ark. 399; *State v. Camden*, 48 N. J. L. 89; *Wheat v. State*, 6 Mo. 455; *Williams v. State*, 35 Ark. 430; *People v. Nyce*, 34 Hun, 298; *Flower v. State*, 39 Ark. 209; *State v. Higgins*, 13 R. I. 330; *State v. Keggon*, 55 N. H. 19;

Com. v. Locke, 114 Mass. 288; *Abbott, Trial Brief*, §§ 739, 740. See § 4, *ante*.

There are many negative propositions which admit of easy and certain proof; for instance, that a man was not at a given place; this may be established by showing that he was at another place, so distant as to render it impossible to suppose that he was at both; and in this and similar cases, the difficulty of showing a negative will have little or no weight in determining upon whom the *onus* lies. *Phil. Ev. Cowen & Hill's Notes*, note 346.

"An affirmative proposition is to be proved by the party advancing it; and so a negative proposition. Among the most authoritative exponents of this view is Mr. Best, in his treatise on Evidence. 'The general rule,' he declares, 'is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute,—according to the maxim, *Ei incumbit probatio qui dicit, non qui negat*;' and to this effect he cites Mr. Starkie and Mr. Phillipps, sustaining his views by a copious exposition. The negative, it is argued, is not susceptible of proof. An affirmative proposition, therefore, is the only kind of proposition which a party can be called upon to prove.

"But to this it has been well replied, that there is no proposition which does not blend negation with affirmation, and in which affirmation of one side does not involve a denial of the other side. An *alibi*, for instance, is at once a negation of the defendant's presence at a particular spot at a particular time, and an affirmation of his presence at another place at the same time. Or the defense of insanity is in like manner both an affirmation and a negation—an affirmation of the existence of disturbing mental conditions, a negation of sanity. Nor is this all. In many cases each party unites, with an affirmation on his part of his own rights, and a denial of the rights of his opponent; and the affirmation and denial are so mixed as to be incapable of severance in proof." *Whart. Crim. Ev.* §§ 19, 320.

§ 263. **A Prima Facie Case will not Rebut the Presumption of Innocence.**—In a criminal case, a prima facie case of guilt does not generally rebut the presumption of innocence, or shift the burden of proof. Until the state proves, in the first instance, beyond a reasonable doubt, the facts which constitute the offense, the accused is not required to establish his innocence by exculpatory evidence. The jury are not authorized to find

the defendant guilty on the evidence of a single witness, upon whose testimony the question of guilt depends, if they have a reasonable doubt of the truth of his statements. *Washington v. State*, 58 Ala. 355.

§ 264. **Burden of Proof in Statutory Crimes.**—In all statutory crimes it is competent for the legislature to say that certain facts proven by the commonwealth shall be sufficient to make out a presumptive case against the accused, and cast the burden of proof upon him, provided the burden is cast upon him to prove his innocence, without first requiring the commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused. For instance, where it has been proven that a faro bank or other table mentioned in the statute has been set up in any of the houses mentioned in the statute, the statute makes such proof evidence that the faro bank or other table was set up by the permission of the person occupying or controlling the house, etc. The constitutionality of this provision has never been questioned. In the case of *Buford v. Com.* 14 B. Mon. 24, the right of the commonwealth to convict on such testimony was sanctioned. *Com. v. Minor*, 88 Ky. 422.

§ 265. **The Rule Deduced from the Celebrated Stokes Case.**—It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor; and that if upon the whole evidence, including that of the defense as well as of the prosecution, the jury entertains a reasonable doubt of the guilt of the accused, he is entitled to the benefit of the doubt. The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them, when the prosecution has made out a prima facie case and evidence has been introduced tending to show a defense, that they must convict, unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are fully satisfied that he has proved his innocence. *Stokes v. People*, 53 N. Y. 164, 13 Am. Dec. 492.

§ 266. **Views of Sir James Stephen.**—“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist. If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. . . . The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rests at first by his proving facts which raise a presumption in his favor. . . . The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. . . . The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.” Stephen, Dig. chap. 13.

§ 267. **Summary of the Conclusions Reached.**—It is idle to pursue this topic further, as there are few legal propositions that are so wholly bereft of technical embarrassments. The formula we may safely adduce from the reported cases as to the burden of proof, may be stated as follows: It is obligatory upon the state to sustain the burden of proof throughout the trial, so far as regards the material averments of the indictment, and the proof of the same. And as regards these averments, the burden of proof never shifts. Where, however, the defense relies upon some distinct substantive matter which is calculated to exempt him from punishment and absolve him from liability, then that is matter foreign to the issue as made by the state in her charge against

him, and the burden of proving it in reason, common sense and law, should be upon the defendant. *Ake v. State*, 6 Tex. App. 398, 32 Am. Rep. 586. For an exceedingly valuable review of this discussion, the practitioner is referred to an extended note appended to the case of *Boswell v. State*, 53 Ala. 307, as reported in 53 Am. Rep. 20.

The "ultimate essence" of all reasoning on the subject may be thus expressed: "The evidence given by the prosecution must furnish an adequate foundation for the conclusion of fact involved in the verdict against the accused." Otherwise the state has failed to rid itself of the *onus probandi* and the trial must result in an acquittal.

CHAPTER XXXVI.

REASONABLE DOUBT.

- § 268. *Difficulty in Defining.*
- 269. *The Phrase "Moral Certainty" Examined.*
- 270. *Observations of Authority on the Term "Reasonable Doubt."*
- 271. *Views of the Missouri Supreme Court.*
- 272. *Extended Citation of the Authorities.*

§ 268. **Difficulty in Defining.**—Many efforts have been made to define the expression "reasonable doubt," and hitherto the definitions given are not remarkable for clearness of thought or accuracy of expression. They appear generally to be involved in the uncertainty of the subject which they are attempting to define, and it is much easier to say what is not a correct definition of the term than to determine the precise signification of the expression as used in the trial of criminal cases.

The following instruction as to what was meant by "reasonable doubt" was approved by Campbell, *Ch. J.*, in *People v. Finley*, 38 Mich. 482, viz:

"A 'reasonable doubt' is a fair doubt, growing out of the testimony in the case. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense. It is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say you have an abiding conviction, to a moral certainty, of the truth of the charge here made against the respondent."

A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause. *May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457; *Connaghan v. People*, 88 Ill. 460; *Dunn v. People*, 109 Ill. 635.

A reasonable doubt entertained by some of the members of the jury may not compel an acquittal, but it may so strongly prevail, and among so many, as to warrant others in yielding their opin-

ions, and joining in a verdict of acquittal. *Stitz v. State*, 104 Ind. 359.

It is not easy to define, in a few words, what a reasonable doubt is, and, in some jurisdictions, it is deemed good practice not to attempt any explanation. In Ohio it is common to define the term. When it is attempted, the explanation should be an accurate one. The definition given by Birchard, *J.*, in *Clark v. State*, 12 Ohio, 483, *note*, 40 Am. Dec. 481, is well established as a safe one, and its sufficiency is not impaired by its age. It is safe to follow established precedents. *Morgan v. State*, 48 Ohio St. 371. The definition referred to is as follows:

"You will be justified and are required to consider a reasonable doubt as existing, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. You will look, then, to all the evidence and if that satisfies you of the defendant's guilt, you must say so. If you are not fully satisfied, but find only that there are strong probabilities of guilt, your only safe course is to acquit." Birchard, *J.*, in *Clark v. State*, 12 Ohio, 495, *note*, 40 Am. Dec. 181.

In criminal matters nothing is to be taken by intendment, but the utmost strictness of construction prevails in favor of liberty and life. *State v. Dickinson*, 41 Wis. 299. Again, it is an imperative rule of evidence that the allegations of the prosecutor must be proved beyond reasonable doubt. In civil cases, the law, in general, only requires that the fact in issue shall be established by the party having the burden of proof, to the reasonable satisfaction of the jury. This appears to be the meaning of the phrase "by a preponderance of proof." *Com. v. York*, 9 Met. 93, 43 Am. Rep. 373; *Richardson v. Burleigh*, 85 Mass. 479.

The administration of the criminal law is essentially dependent, in a large degree necessarily, on the existence and force of circumstances, for the purpose of making out criminal charges. This results from the fact that crimes ordinarily seek concealment. They are committed ordinarily, openly, and before the public, or before the public eye, but occasions are sought for the commission

of crime when safety or security from observation, or from prosecution and punishment to a certain degree, may be within hope and the expectation of the culprit. For this reason it has been found at all times in the intelligent administration of the law necessary to resort in a great measure to the force and effect of circumstances in order to discover from the inference, that may be drawn from the circumstances whether the offense has or has not been committed. The law upon this subject has been wisely and carefully settled for the purpose of guarding the rights and interests of the defendant as well as protecting those of the public. And it requires, where the case depends, at least one branch of it depends, on circumstantial evidence, that those circumstances shall be of such a persuasive or satisfactory character as to leave no rational ground of doubt as to the defendant's guilt, before he may be convicted. In other words, the circumstances are required to be of so forcible a nature as to exclude every other reasonable supposition or hypothesis or theory than that of the defendant's guilt, before a conviction can be reached by force of evidence of this description:

"A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind, and considering all the evidence produced, it leads to a conclusion which satisfies the judgment, and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony. Such questioning is not what is a reasonable doubt, but the circumstances, if the case is one of circumstantial evidence, must so concur that no well established fact or circumstance, which is capable of controlling the case, should go counter to the conclusions sought to be reached, or which are to be reached. If all the circumstances concur in one result, it is for the jury to say whether those circumstances are sufficient to establish that result, or whether there is a failure to cover probabilities of the case, so as to make it reasonably certain that the fact has been made out. . . ." *Com. v. Costley*, 118 Mass. 16.

Mr. Justice Graves, in *People v. Marble*, 38 Mich. 125, considered the following instruction misleading and inaccurate, viz:

“What I mean by a ‘reasonable doubt’ is that it must be such evidence as would satisfy you,—as you would be willing to act upon in any of your own important concerns, your own business. Such evidence as would satisfy you it would be proper for you to act upon in any of your own private concerns,—that would be evidence that would satisfy you beyond a ‘reasonable doubt.’ That is what this means.”

We do not think that the phrase “reasonable doubt” is of such unknown or uncommon signification that an exposition by a trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a “doubt” is a fluctuation or uncertainty of mind arising from defect of knowledge or of evidence, and that a doubt of the guilt of the accused, honestly entertained, is a “reasonable doubt.”

We repeat here what was said by *Mr. Justice Campbell* upon this subject in *Hamilton v. People*, 29 Mich. 194, namely:

“But we do not think that juries can derive any help from attempts, by numerous and complicated requests, to explain what would be very much plainer without them. If a jury cannot understand their duty when told they must not convict when they have a reasonable doubt of the prisoner’s guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish. Jurors are presumed to have common sense, and to understand common English; but they are not presumed to have professional or any high degree of technical or linguistic training.” *People v. Stubbenvoll*, 62 Mich. 329.

“Then, what is reasonable doubt? It is a term often used . . . but not easily defined. It is not a moral and possible doubt, because everything relating to human affairs and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after entire consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the prosecutor; all the presumptions of law, independent of evi-

dence, are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability . . . that the fact charged is more likely to be true than the contrary, but the evidence must establish the proof of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it; this we take to be proof beyond a reasonable doubt, because if the law, which depends mostly upon considerations of a moral doubt, should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether." Shaw, *Ch. J.*, in *Com. v. Webster*, 5 Cush. 320, 52 Am. Dec. 711.

§ 269. **The Phrase "Moral Certainty" Examined.**—"The phrase 'moral certainty' has been introduced into our jurisprudence from the publicists and metaphysicians, and signifies only a very high degree of probability. It was observed by Puffendorf that, 'when we declare such a thing to be morally certain, because it has been confirmed by credible witnesses, this moral certitude is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us.' 1 Law of Nature & Nations (Eng. ed. 1749) chap. 2, § 11. 'Probable evidence,' says Bishop Butler, in the opening sentence of his Analogy, 'is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption.' Proof 'beyond a reasonable doubt' is not beyond all probable or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof 'to a moral certainty' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. . . . 'The evidence must establish the truth of the fact to a reasonable and moral certainty a certainty that convinces and directs the understanding, and sat-

ifies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which most depends upon considerations of a moral nature, should go further than this, and require absolute certainty it would exclude circumstantial evidence altogether.' See also *Com. v. Goodwin*, 14 Gray, 45. Baron Parke, in a case tried before him, expressed the same thought conversely, thus: 'Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' *Reg. v. Sterne*, Surrey Sum. Assizes, 1843, cited in Best, Ev. § 95. And instructions that the jury should be satisfied of the defendant's guilt beyond a reasonable doubt have often been held sufficient, without further explanation. *Com. v. Tuttle*, 12 Cush. 502; *Com. v. Cobb*, 14 Gray, 57; *Com. v. Harman*, 4 Pa. 269; *Reg. v. White*, 4 Fost. & F. 383 and note. . . . When several forms of expression are equally accurate, it is within the discretion of the court at the trial to choose that form which it deems best adapted to make the rule of law intelligible to common minds. *Kelly v. Jackson*, 31 U. S. 6 Pet. 622, 8 L. ed. 523; *Morris v. Bowman*, 12 Gray, 467; *Blake v. Sawin*, 10 Allen, 340; *State v. Reed*, 62 Me. 129." *Com. v. Costley*, 118 Mass. 23.

§ 270. **Observations of Authority on the Term "Reasonable Doubt."**—When the evidence is conflicting, it is error for the court to refuse to charge the doctrine of reasonable doubt. N. Y. Code Crim. Proc. §§ 389, 390; *Spears v. State*, 2 Tex. App. 244; *May v. State*, 6 Tex. App. 191; *Mace v. State*, 6 Tex. App. 470; *Snyder v. State*, 59 Ind. 105; Whart. Hom. (2d ed.) § 649. Where the court, in defining what is a reasonable doubt, includes something which ought not, in fairness to the prisoner, to be included, a new trial should be granted. *State v. Johnson*, 16 Nev. 36; *People v. Brown*, 59 Cal. 345; *Anderson v. State*, 41 Wis. 430; *Meyers v. Com.* 83 Pa. 143; *Castle v. State*, 75 Ind. 146; *State v. Sloan*, 55 Iowa, 220. A reasonable doubt may not only arise out of the evidence, but may be the result of a want of evidence. *Massey v. State*, 1 Tex. App. 564; *Densmore v. State*, 67 Ind. 306; *Wright v. State*, 69 Ind. 163, 35 Am. Rep. 212; *Batten v. State*, 80 Ind. 394; *Holmes v. State*, 9 Tex. App. 313; *State v. Rover*, 11 Nev. 348; *Mixon v. State*, 55 Miss. 527. A reasonable doubt exists when the evidence is not sufficient to satisfy the judgment of the truth of a proposition with such certainty that a

prudent man would feel safe in acting upon it in his own important affairs. *Arnold v. State*, 23 Ind. 170; *State v. Reed*, 62 Me. 142; *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481; *Com. v. Costley*, 118 Mass. 16; *People v. Finley*, 38 Mich. 482; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *State v. Bridges*, 29 Kan. 138; *State v. Summers*, 9 West. L. J. 415. Nor is it an answer to what has been said, that the aggregated common sense of the twelve jurors is to determine when a juror is "able to give some reason" for his doubt. It is not necessary he should be able to do so even to his own satisfaction. *Densmore v. State*, *Wright v. State*, *Anderson v. State* and *Meyers v. Com. supra*; *People v. Ah Sing*, 51 Cal. 372; Bishop, Crim. Proc. § 1094; *People v. Schryer*, 42 N. Y. 6, 1 Am. Rep. 480; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642.

§ 271. **Views of the Missouri Supreme Court.**— Without attempting to clothe the decisions of the Missouri supreme court with any extra-territorial effect, or to impute to them any specialized virtue, we may still insist that the exceptional mental equipment of that court imparts to its decisions a very high degree of legal certitude. Its expositions of the law have been rarely questioned, and the identical topic under review has been the subject of very recent consideration. In order to italicise a distinction of great importance, I excerpt from the opinion of *Chief Justice Henry* in the case of *State v. Shaeffer*, 89 Mo. 271, which was handed down in 1886, and faithfully represents the present status of the law relating to the subject, not only in the state of Missouri but throughout our entire federation. The argument unfolds itself with all the precision and certainty of a mathematical demonstration.

14. "The burden of proof to establish the guilt of defendant devolves upon the state, and the law clothes him with a presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt. By a reasonable doubt, is meant a substantial doubt, based upon the evidence or want of evidence in the case, and is not a bare possibility of defendant's innocence." This instruction was approved and declared to be the law in all criminal cases. *State v. Gonce*, 79 Mo. 600.

In a subsequent case the court was obliged to encounter the same question and reverse a conviction in a criminal case because

of a slight departure on the part of the trial court from the well recognized instructions previously given, as to what constitutes reasonable doubt. The court employs the following language:

“In law a party accused of crime is presumed to be innocent until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this cause you entertain a reasonable doubt as to the guilt of defendant you will give him the benefit of such a doubt and find him not guilty. In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty. You will observe, however, that the doubt to authorize an acquittal on that ground alone must, as stated, be reasonable and must be also one fairly deducible from the evidence considered as a whole.’

“The mere possibility that the defendant may be innocent will not authorize an acquittal. It declares very properly ‘that one accused of crime is presumed to be innocent until the contrary is proven beyond a reasonable doubt. If therefore, upon a consideration of all the evidence in this case you entertain a reasonable doubt of the guilt of the defendant, you will give him the benefit of such doubt and find him not guilty. . . . In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty; you must accept the theory most favorable to the defendant and render a verdict finding him not guilty.’ This attempted explanation of the term ‘reasonable doubt’ would eliminate it from the criminal code, and leave juries to find verdicts in criminal cases upon the mere preponderance of the evidence. By that explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case. The doctrine expressed in this explanation is exactly that which is applicable in a civil action, in which, if the facts proven can be reasonably reconciled with the theory that the defendant

owes what he is sued for as that he does not, the defendant is entitled to a verdict. The plaintiff must make out his case and if the evidence is evenly balanced he cannot recover." *State v. Shaeffer*, 89 Mo. 282.

§ 272. **Extended Citation of Authorities.**—Innumerable decisions illustrate the attitude of the American judiciary towards this important subject. Our criminal annals contain many expositions of the governing rule. And still with all this reiterated announcement of what that rule embodies and with solemn and oracular warnings of what fatal results follow its want of observance, it is a frequent spectacle to see the convictions of undoubted criminals set aside, justice frustrated, law brought into disrepute, because of attempted innovations upon the phraseology of the rule regarding reasonable doubt.

There is but little difficulty in the application of this rule when once its formula is cordially accepted and the court ceases to struggle for originality in cases where precedent should alone govern. Very deliberate consideration is required in order to reach this desired formula and a statutory definition is perhaps the most effective evasion of the discordant syntax of the present embarrassment. As indicating the present contradiction that prevails in this mere matter of definition we will cite a formidable array of authority collected from both the Federal and state decisions.

Kennedy v. People, 40 Ill. 488; *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455; *Springdale Cemetery Asso. v. Smith*, 24 Ill. 480; *Pate v. People*, 8 Ill. 661; *Warren v. Dickson*, 27 Ill. 115; *State v. Kearley*, 26 Kan. 77; *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481; *McKleroy v. State*, 77 Ala. 95; *Hamilton v. People*, 29 Mich. 194; *People v. Steubenvoll*, 62 Mich. 329, 8 Crim. L. Mag. 265; *Com. v. Tuttle*, 12 Cush. 502; *Com. v. Cobb*, 14 Gray, 57; *Bramlette v. State*, 21 Tex. App. 611, 57 Am. Rep. 622; *Schultz v. State*, 20 Tex. App. 316; *State v. Dineen*, 10 Minn. 408; *State v. Nelson*, 11 Nev. 334; *People v. Phipps*, 39 Cal. 326; *People v. Padillia*, 42 Cal. 536; *Com. v. Costley*, 118 Mass. 1; *State v. Vansant*, 80 Mo. 67; *Dunn v. People*, 109 Ill. 635; *Sullivan v. State*, 52 Ind. 309; *State v. Pierce*, 65 Iowa, 89; *Minich v. People*, 8 Colo. 454; *James v. State*, 45 Miss. 572; *People v. Ashe*, 44 Cal. 288; *State v. Bridges*, 29 Kan. 138; *State v. Hayden*, 45 Iowa, 17; *Polin v. State*, 14 Neb. 540; *United*

States v. Jackson, 29 Fed. Rep. 503; *Jane v. Com.* 2 Met. (Ky.) 30; *State v. Oscar*, 52 N. C. 305; *Ray v. State*, 50 Ala. 104; *Bradley v. State*, 31 Ind. 492; *State v. Crawford*, 34 Mo. 200; *Garfield v. State*, 74 Ind. 60; *Stout v. State*, 90 Ind. 1; *Connaghan v. People*, 88 Ill. 460; *United States v. Johnson*, 26 Fed. Rep. 682; *State v. Rounds*, 76 Me. 123; *State v. Reed*, 62 Me. 192; *Blocker v. State*, 9 Tex. App. 279; *State v. Ostrander*, 18 Iowa, 437; *May v. People*, 60 Ill. 119; *Miller v. People*, 39 Ill. 457; *State v. Gee*, 85 Mo. 647; *Com. v. Carey*, 2 Brewst. 404; *Cicely v. State*, 13 Smedes & M. 202; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *Bray v. State*, 41 Tex. 560; *State v. Owens*, 79 Mo. 620; *State v. Smith*, 21 Mo. App. 595; *People v. Finley*, 38 Mich. 482; *McMeen v. Com.* 114 Pa. 300; *Donnelly v. State*, 26 N. J. L. 602; *State v. Ah Lee*, 7 Or. 237; *United States v. Foulke*, 6 McLean, 349; *McElven v. State*, 30 Ga. 869; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835; *People v. Davis*, 64 Cal. 440; *State v. Willingham*, 33 La. Ann. 537; *Bressler v. People*, 117 Ill. 422; *Sumner v. State*, 5 Blackf. 579, 36 Am. Dec. 561; *Leigh v. People*, 113 Ill. 372; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Mullins v. People*, 110 Ill. 42; *Marion v. State*, 16 Neb. 349; *Brady v. Com.* 11 Bush, 282; *Davis v. People*, 114 Ill. 86; *State v. Carland*, 90 N. C. 668; *State v. Willis*, 63 N. C. 26; *People v. Rodrigo*, 69 Cal. 601; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Com. v. Leonard*, 140 Mass. 473, 54 Am. Rep. 485; *State v. Buckley*, 40 Conn. 246; *Powers v. State*, 87 Ind. 145; *Hudelson v. State*, 94 Ind. 420, 48 Am. Rep. 171; *O'Neil v. State*, 48 Ga. 66; *Adams v. State*, 29 Ohio St. 412; *Stitz v. State*, 104 Ind. 359; *State v. Witt*, 34 Kan. 488; *Com. v. Tuey*, 8 Cush. 1.

CHAPTER XXXVII.

EVIDENCE OF MALICE, MOTIVE, PREMEDITATION AND INTENT.

- § 273. *Malice Defined.*
- 274. *May be Expressed or Implied.*
- 275. *How Proved.*
- 276. *Burden of Proof as to.*
- 277. *Intoxication as Affecting Malice.*
- 278. *Legal Significance of the Term "Motive."*
- 279. *Term "Motive" Defined.*
- 280. *Collateral Facts in Relation to Motive.*
- 281. *Any Proof Suggesting Motive is Relevant.*
- 282. *What is Implied by the Term "Premeditation."*
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- 284. *Statement of the Rule as to Criminal Intent.*
- 285. *Intent, how Proved.*
- 286. *Presumption as to.*
- 287. *Prosecution may Show Evil Intent.*
- 288. *Accused may Testify as to his Intent.*
- 289. *Digest Form of the Present Rule.*
- 290. *When Conviction may be Had in the Absence of Criminal Intent.*
- 291. *Time not Necessary to Form Criminal Intent.*
- 292. *Review of the Authorities.*

§ 273. **Malice Defined.**—Malice in legal contemplation signifies a wrongful act perpetrated without reasonable cause and the intention with which the act is done is an inference of law based upon a well known presumption that the man shall be regarded as intending the legitimate results of his act. *United States v. Coffin*, 1 Sumn. 394; *Maynard v. Fireman's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672; *Wiggin v. Coffin*, 3 Story, 7; *People v. Taylor*, 36 Cal. 255; *Worley v. State*, 11 Humph. 172; *Hayes v. State*, 58 Ga. 35; *Williams v. State*, 3 Tex. App. 316; *Beauchamp v. State*, 6 Blackf. 299; *Plasters v. State*, 1 Tex. App. 673; *Lossen v. State*, 62 Ind. 437; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *State v. Hays*, 23 Mo. 287; *Lander v. State*, 12 Tex. 462; *Com. v. Goodwin*, 122 Mass. 19; *Com. v. Green*, 1 Ashm.

289; *State v. Town*, Wright (Ohio) 75; *United States v. Taylor*, 2 Sumn. 586; *Reg. v. Selten*, 11 Cox, C. C. 674; *Blunt v. Little*, 3 Mason, 102; *Rex v. Philp*, 1 Moody, C. C. 264; *United States v. Outerbridge*, 5 Sawy. 620; *Bromage v. Prosser*, 4 Barn. & C. 247. See also 1 Russell, Crimes (9th ed.) 667; 1 Whart. Am. Crim. L. (8th ed.) §§ 106, 122; 1 Bishop, Crim. L. (6th ed.) 429; 4 Bl. Com. 199; 1 Archb. Crim. Pr. & Pl. 368.

§ 274. **May be Expressed or Implied.**—Actual proof of intention is not always needed. Malice, the essence of all crime, may be expressed or implied. *Brown v. Com.* 76 Pa. 319. Nor is it indispensable to a conviction that a motive be proved. *People v. Robinson*, 1 Park. Crim. Rep. 649; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

§ 275. **How Proved.**—"Malice is proved in the same manner as intent—from the admissions or the overt acts of the offender. It may generally be inferred from the nature of the act itself. If a man do an act which cannot be of any benefit to himself or to those with or for whom he is acting, and which must necessarily be of injury to another person, . . . the jury will be warranted in inferring that the act was done from malice to the owner or party injured.

"Malice may also be implied where no malice against any particular person in fact existed. Even in murder, which is the highest offense of this class, in which malice forms a most material ingredient, and where the malice must be preconceived, malice may in this way be implied, although none actually existed as against any particular person. . . . So where a person fires a loaded pistol among an assembly of persons, or in the public streets where many persons are passing, and thereby kills a man, or the like, he is guilty of murder. So, in all other cases where a man willfully does an act which he knows must, or probably will, cause the death of another whom he knows not, and a man is thereby killed, he is guilty of murder, in the same manner as if he had preconceived malice against the individual killed." Archb. Crim. Pr. & Pl. chap. 4, p. 121.

So malice may be proved by direct evidence, such as prior threats, or seeking an opportunity to perpetrate the act. This is called express malice, and proof of such malice in this case would be evidence of premeditation, and would make the case murder in the first degree, if otherwise made out beyond a reasonable

doubt. Malice may also be implied from the act of killing, as if the killing is done purposely and without justification, legal excuse or reasonable provocation. And if the act is perpetrated with a deadly weapon so used as to be likely to produce death, the purpose to kill may be inferred from the act. *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

When the *scienter* or *quo animo* becomes an essential factor in the problem of guilt or innocence to be solved, when proof of malice becomes indispensable to a conviction, such evidence of other like acts may then be competent. Whart. Am. Crim. L. 649. It is so when proof of the motive becomes peculiarly material on account of some peculiarity of the crime, or its dependence on some peculiar motive, when the act is innocent as a rule, and its criminality the exception. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

§ 276. **Burden of Proof as to.**—Where the commission of a homicide by the defendant is proved, the law presumes it to have been done with malice, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolve upon him, unless the proof on the part of the prosecution tends to show that it only amounted to manslaughter, or that the defendant was justifiable or excusable. *People v. Bush*, 71 Cal. 602; *Thomas v. People*, 67 N. Y. 218; *State v. Lautenschlager*, 22 Minn. 514; *Meyers v. Com.* 83 Pa. 131; *State v. Zeibart*, 40 Iowa, 169.

§ 277. **Intoxication as Affecting Malice.**—In *State v. Johnson*, 40 Conn. 136, to convict of murder in the first degree it was necessary to show willful, deliberate intent and actual malice. The court said: "But the real question is, whether drunkenness, as a fact, may be considered by the jury as evidence tending to disprove an essential fact in the case, a deliberate intention to take life." Upon the question of malice, "the state of the prisoner's mind is material. In behalf of the defense, insanity, intoxication or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed." *Lancaster v. State*, 2 Leigh, 575, 3 Am. Crim. Rep. 160, *note*.

If defendant was at the time of committing the act intoxicated,

the jury will consider that fact as an evidence tending to show an absence of premeditation or deliberation. New York Code Crim. Proc. title 1, p. 5, § 22; 1 Whart. Am. Crim. L. § 41; *Haile v. State*, 11 Humph. 154; *Com. v. Jones*, 1 Leigh. 598; *Pirtle v. State*, 9 Humph. 663; *Swan v. State*, 4 Humph. 136; *Boswell v. Com.* 20 Gratt. 860; *Lancaster v. State*, 2 Lea, 575; *Schlencker v. State*, 9 Neb. 241; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Belencia*, 21 Cal. 544; *Ferrell v. State*, 43 Tex. 503; *Colbath v. State*, 2 Tex. App. 391; Whart. Hom. § 587, *et seq.*; *Com. v. Dorsey*, 103 Mass. 412; *Kelly v. Com.* 1 Grant, Cas. 484; *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414; *Jones v. Com.* 75 Pa. 403; *State v. Johnson*, 40 Conn. 136; *People v. Williams*, 43 Cal. 344; *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558; *People v. Ferris*, 55 Cal. 588; *People v. Harris*, 29 Cal. 678; *People v. Batting*, 49 How. Pr. 392; *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556. If defendant, at the time of committing the act, was in a state of mental confusion, of which drink was the cause, the jury will consider the same as evidence tending to show that there was no specific intent to take life, or that there was no positive premeditation. Whart. & S. Medical Jurisprudence, § 70, *note s.*; Whart. Hom. 371.

A refusal to charge on a trial for murder, that intoxication absolutely tends to show absence of premeditation and deliberation is not error. *People v. Mills*, 98 N. Y. 176.

§ 278. **Legal Significance of the Term "Motive."**—The law recognizes the principle that men are impelled to commit crimes from some motive. There are, indeed, few motiveless crimes, and among the motives impelling men to crime is that of gain. In a thoughtful and philosophical treatise it is said: "As there must pre-exist a motive to every voluntary action of a rational being, it is proper to comprise in the class of moral indications such particulars of external relation as are usually observed to operate as inducements to commission of crime" and among the motives that influence human conduct this author classes that of gain. Wills, Circ. Ev. 39.

Another author says: "In looking at the motives which instigate human conduct, we ascend to the very origin of crime." Burrill, Circ. Ev. 281. At another place this author says: "The motive of gain, in the stricter sense of the term, may be excited by two different classes of objects, first, by something visible and

tangible, which the party meditating the crime desires to possess; and, secondly, by some substantial benefit which is expected to accrue as the result of the contemplated act." Burrill, Circ. Ev. 285.

The case of *State v. Cohn*, 9 Nev. 179, supplies an illustration of the practical application of these principles. In that case the appellant was charged with arson, and it was held that evidence of over-large insurance upon his goods was competent "to show a possible or probable motive, such motive being a material link in the chain of circumstances." In the course of the opinion in that case it was said: "Now, it is not a natural thing for a man to fire his own premises; presumptively appellant was innocent. What then is the logical and natural course of human thought at such a juncture? Is it not to inquire what motive, if any, existed which could have influenced a sane person to do such an act? Such was the course pursued by the prosecution, the motive was sought, and by it claimed to be found in the fact of an undue insurance; not only a perfectly proper proceeding, but indeed the only one open." The same principle is declared in *Com. v. Hudson*, 97 Mass. 565, and in *Shepherd v. People*, 19 N. Y. 537. In this last case Denio, *J.*, speaking for the court, said: "The prisoner's house had been burned and he was charged, upon circumstantial evidence, with having set it on fire. Prima facie he had no motive for the act, but a strong pecuniary one against it. But if he had a contract of indemnity, and especially if under it he might probably obtain more than the value of the property, the case would be quite different."

Mr. Bishop says: "Evidence that the insurance was for more than the worth of the building is pertinent; also, that the defendant attempted to procure payment of what was thus excessive." 2 Bishop, Crim. Proc. § 50. These cases are in harmony with the general rule which that author thus states: "Hence proof of motive is never indispensable to a conviction. But it is always competent against the defendant." 1 Bishop, Crim. Proc. § 1107; Wills, Circ. Ev. 41; *Goodwin v. State*, 96 Ind. 550, 560.

While it is competent to prove facts tending to show an evil motive, yet such facts are always susceptible of explanation. Motive is but a circumstance, and it is always proper to explain the act which is adduced as evidence of a wicked motive.

§ 279. Term "Motive" Defined.—"Motive is an inducement,

or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act, which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives, in any speculative sense, neither the law nor the tribunal which administers it, has any concern. It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling, and in such cases the fact from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case." Church, *Ch. J.*, in *People v. Bennett*, 49 N. Y. 137.

In criminal prosecutions it is always competent for the state's attorney to show that the motive for the offense was the hope of gain. *Kennedy v. People*, 39 N. Y. 245.

§ 280. **Collateral Facts in Relation to Motive.**—"Evidence of collateral facts which may appear to have presented a motive for a particular action deserves *per se* no weight. With motives merely the legislator and the magistrate have nothing to do; actions, as the objects or results of motives, are the only legitimately cognizable subjects of human law. *Actus non facit reum nisi mens sit rea* is a maxim of reason and justice not less than of positive law. Motives and their objects differ, it has been remarked, as the springs and wheels of a watch differ from the pointing of the hour, being mutually related in like manner. But such evidence is most pertinent and important when clearly connected with declarations which demonstrate that the particular motive has passed into action, or with inculpatory moral facts which it tends to explain and co-ordinate, and which would otherwise be inexplicable." Wills, *Circ. Ev.* 42.

"On a late trial for murder, Lord Chief Justice Campbell thus summed up the doctrine under discussion: 'With respect to the alleged motive, it is of great importance to see whether there was a motive for committing such a crime, or whether there was not; or whether there is an improbability of its having been committed, so strong as not to be empowered by positive evidence. But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from the experience of criminal courts, that atrocious

crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties.'” Wills, Circ. Ev. 44.

§ 281. **Any Proof Suggesting Motive is Relevant.**—Proof tending to show that the deceased had money, suggests a motive for committing a robbery, and so a motive to take the life of the deceased, if that would facilitate the theft, or contribute to its concealment. Such a fact formed a prominent circumstance, tending to the conviction of the prisoner, in *Gordon v. People*, 33 N. Y. 501, and was not suggested as of doubtful admissibility in that case, and the court, in *Hendrickson v. People*, 10 N. Y. 13, went much further in sustaining the admission of evidence, tending, as was claimed, to show a motive for the commission of the crime charged, by receiving the testimony, which, at most, only showed that the prisoner had a diminished interest in the continuance of his wife's life. It is always a just argument, on behalf of one accused, that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends, in some degree, to render the act so far probable as to weaken presumptions of innocence, and corroborate evidence of guilt.

§ 282. **What is Implied by the Term “Premeditation.”**—Premeditation implies beforehand, or previous deliberation, and while all this must transpire before the fatal act, by some appreciable space of time, yet no particular length of time is required. If there be time for choice as the result of reflection that is sufficient. The mental processes are so swift that premeditation may be found to exist within the very shortest time. *United States v. King*, 34 Fed. Rep. 302.

Premeditation differs essentially from will, which constitutes crime, because it supposes, besides an actual will, a deliberation and a continued persistence which indicates mere perversity. Bouvier, Law Dict. title *Premeditation*.

Willful, deliberate and premeditated, are merely cumulative and expressive of the same idea (*People v. Pool*, 27 Cal. 572. See *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93), and standing in the relation to the offense of murder is a conclusion of law drawn from certain facts. *People v. Jacinto Aro*, 6 Cal. 207; *State v. Crozier*, 12 Nev. 300; *Judge v. State*, 58 Ala.

406; *King v. Com.* 2 Va. Cas. 78; *Rex v. Shaw*, 6 Car. & P. 372. But premeditation will not be implied from the use of a deadly weapon. *Clark v. State*, 8 Humph. 671.

No appreciable time need intervene between the premeditated intent and the homicidal act. *People v. Nichol*, 34 Cal. 211; *People v. Williams*, 24 Cal. 31, 43 Cal. 344; *Miller v. State*, 54 Ala. 155; *Jones v. Com.* 75 Pa. 403, 1 Am. Crim. Rep. 262; *People v. Cotta*, 49 Cal. 169; *Halbert v. State*, 3 Tex. App. 656; *State v. Dunn*, 18 Mo. 419; *Green v. State*, 13 Mo. 382; *State v. Hays*, 23 Mo. 287; *State v. Garrand*, 5 Or. 216; *State v. Holmes*, 54 Mo. 153; *People v. Bealoba*, 17 Cal. 389; *State v. Johnson*, 8 Iowa, 525, overruling *Fouts v. State*, 4 G. Greene, 500. See *Com. v. Green*, 1 Ashm. 289; *State v. Millain*, 3 Nev. 409; *Lewis v. State*, 3 Head, 127; and see *Binns v. State*, 66 Ind. 433; *Beauchamp v. State*, 6 Blackf. 299; *Fahnestock v. State*, 23 Ind. 231; *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414; *McKenzie v. State*, 26 Ark. 334; *State v. Jennings*, 18 Mo. 435; *Duebbe v. State*, 1 Tex. App. 159; *Wright v. Smith*, 22 Gratt. 880. A momentary deliberation may suffice. *Duebbe v. State*, *supra*. The reflection and premeditation may take place even at the moment of committing the act, and, like any other fact, may be proved by circumstances which exclude every reasonable doubt. *Whiteford v. Com.* 6 Rand. (Va.) 722; *Com. v. Jones*, 1 Leigh, 611; *People v. Clark*, 7 N. Y. 385; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Shoemaker v. State*, 12 Ohio, 43; *People v. Freel*, 48 Cal. 436; *O'Brien v. People*, 48 Barb. 274; *State v. Dunn*, 18 Mo. 419; *State v. Holme*, 54 Mo. 153; *State v. Johnson*, 8 Iowa, 525, 74 Am. Dec. 321; *Lewis v. State*, 3 Head, 127; *Donnellan v. Com.* 7 Bush, 676; *State v. Ah Lee*, 8 Or. 214; see *Burgess v. Com.* 2 Va. Cas. 488; Desty, Am. Crim. L. § 129 note K.

§ 283. **Wide Range of the Evidence as to Premeditation.**—Premeditation of crime, or the means to do it with, may precede the bare act of it a long time. Hence, evidence of them may seem to take a wide range in both time and space. Buying poison may be shown, or stealing it, no doubt, with burglary and arson, perhaps; it may be a witness of a former crime, or a *particeps criminis* liable to turn state's evidence, who is put out of the way; prior like attempts on the same person or thing, or like crimes on other persons, but standing in similar relations and giving rise to the same motives; sexual crimes or acts indicating a

desire of change in marriage relations—in all these cases, and many more found in the books, a prior crime may be disclosed; but in all of them this disclosure is a mere incident, not an element or the burden of the evidence. And this we understand to be the true rule and spirit of all the authorities. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

§ 284. **Statement of the Rule as to Criminal Intent.**—It is a general proposition previously adverted to, that the rules of evidence in civil cases apply with equal force in the investigation of criminal offenses; but in such investigation many rules are in vogue which are not recognized in civil causes. For instance: “A cardinal doctrine of criminal law is, that it is the intention with which an act is done, that constitutes its criminality. The intent and the act must both concur, to constitute the crime; and, hence, the intent must be proved, like the other material facts in the case. This proof may be either by evidence, direct or indirect, tending to establish the fact, or by an inference of law, from other facts proved. Thus, where an act, in itself indifferent, becomes criminal, if done with a particular intent, there the intent must be proved and found, but, if the act is in itself unlawful, the law implies a criminal intent.” Haines, Justices of Peace, 687, citing 3 Greenl. Ev. § 13.

Guilty knowledge, or guilty intent, is, in general, an essential element in crimes at common law; but, whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offense is a matter of construction, to be determined from the language of the statute, in view of its manifest purpose and design. *Com. v. Weiss*, 11 L. R. A. 530, 139 Pa. 247.

§ 285. **Intent, how Proved.**—The state is not expected, and cannot be required, to make proof of felonious intent, as a fact, by direct and positive evidence; for, as a general rule, men who do or commit acts which the law denounces as public offenses do not proclaim in public places the intent with which such acts are done. If the state were required to make direct and positive proof of the felonious intent which characterizes the act done as a public offense, the result would be that many persons, charged and guilty of public crimes, would go acquitted, “unwhipt of justice.” Therefore all that the state is required to do, in such cases, is to introduce such evidence on the trial of the cause as

will satisfy the triers of the facts, whether court or jury, beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment. *Padgett v. State*, 103 Ind. 550.

When it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character. 1 Phil. Ev. (Gould's ed.) 231. But to render the declaration competent, the act with which it is connected should be pertinent to the issue; for where the act is in its own nature irrelevant, and when the declaration is *per se* incompetent, the union of the two will not render the declaration admissible. *Wright v. Doe*, 7 Ad. & El. 313.

A man's intention must be judged by his acts and expressions; and it is manifested by circumstances that vary with almost every case that is presented for consideration. The general rule to determine what he intends by his acts is, that a man intends that consequence which he contemplates, and which he expects to result from his acts, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does. 2 Stark. Ev. 573; *State v. Davis*, 38 N. J. L. 176.

§ 286. **Presumption as to.**—A sane man must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. 3 Greenl. Ev. §§ 13, 14; *Rex v. Farrington*, Russ. & R. 207; *Com. v. Webster*, 5 Cush. 305, 52 Am. Dec. 711. But when the intent is the gist of the crime, this presumption, though a very important circumstance in making the proof necessary upon this point to convict, is not conclusive nor alone sufficient, and should be supplemented by other testimony to avoid a reasonable doubt. *People v. Sweeney*, 55 Mich. 586.

“The law infers an intent to do what a party does do. If I come to one of you and draw a pistol and shoot you, it infers that I intended to kill you, if you die from the wounds.” Westbrook, J., in *People v. Batting*, 49 How. Pr. 392. .

Persons of sound mind and discretion must, in general, be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequences of their acts,

as they are supposed to know what the consequences of their acts will be in such transactions. Experience has shown the rule to be a sound one and one safe to be applied in criminal as well as civil cases. Exceptions to it undoubtedly may arise, as where the consequences likely to flow from the act are not matters of common knowledge, or where the act or the consequence flowing from it is attended by circumstances tending to rebut the ordinary probative force of the act or to exculpate the intent of the agent. *First Nat. Bank of Clarion v. Jones*, 88 U. S. 21 Wall. 325, 22 L. ed. 542.

It often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. *State v. Teeter*, 69 Iowa, 717.

This rule is always applied, unless from the circumstances of the case, it affirmatively appears that the will of the actor was subordinated to some controlling and irresistible cause precluding the existence of any voluntary mental action. In Starkie on Evidence it is said, "that a rational agent must be taken to contemplate and intend the natural and immediate consequences of his own act, is a presumption so cogent as to constitute rather a rule of law than of mere evidence." Vol. 2, p. 848. "There is a general presumption in criminal matters that a person intends whatever is the natural and probable consequences of his own action." 1 Phil. Ev. 632. It was said by Judge Andrews that "it is a fundamental rule of evidence of very general application, founded upon observation and experience, that a man is presumed to intend the natural consequences of his act." *Foster v. People*, 50 N. Y. 609.

§ 287. **Prosecution may Show Evil Intent.**—It is always competent for the government to introduce evidence of any facts tending directly to show an evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence, or in necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible. *Com. v. Tuckerman*, 10 Gray, 198. Evidence should have a peculiar and intimate, if not also an inseparable connection with, and tendency to explain and characterize, the act in issue charged against the prisoner.

So, in *Com. v. Campbell*, 7 Allen, 542, it was held that such evidence is inadmissible where the offense charged and that offered to be proved are distinct. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

No doubt, where guilty knowledge is an ingredient of the offense, the knowledge must be found; but actual positive knowledge is not usually required. In many cases, to require this would be to nullify the penal laws. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods, knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys, perhaps, of a notorious thief, under circumstances of secrecy, and at a nominal price, and the jury rightfully hold that these circumstances apprise him that a felony must have been committed. *Andrews v. People*, 60 Ill. 354; *Schriedley v. State*, 23 Ohio St. 130; *Bonker v. People*, 37 Mich. 4.

§ 288. **Accused may Testify as to his Intent.**—Much of the misconception of uncertainty that pervades the right of a party to testify as to his intent, has been dispelled by a late decision of the New York court of appeals. The question is far removed from any approach to certainty, and in the New York case, three of the judges are recorded as dissenting. Still, the majority opinion written by that eminent jurist who is now the chief judge of that celebrated court must be regarded as tending to settle a controversy that is always perplexing and quite apt to result in gross injustice. The case referred to is that of *People v. Baker*, 96 N. Y. 340. The extract from the opinion will disclose the pertinency of the case to the subject we are endeavoring to illustrate.

“The defendant as a witness in his own behalf was permitted to testify that he did not, at the time he received the \$575, intend to defraud Meeker. He was also asked this question, ‘Was your intention when you received moneys from time to time from Meeker, to defraud him?’ That was objected to as incompetent and inadmissible, and the objection was sustained. As the intent with which those moneys were received was one of the material inquiries he should have been permitted to show that he did not

receive them with any fraudulent intent. The case went to the jury in such a way as to enable the people to claim, that not only the \$575 was received by the defendant with the intent to defraud Meeker, but that all the other moneys were received in the same way, and that the receipt of all the moneys had a tendency to show with what intent the \$575 was received; and hence the defendant clearly had the right to show that he had no fraudulent intent in receiving any of it.

"The defendant, after answering that at the time he received the \$575 he did not intend to defraud Meeker, was also asked to state his intention at the time he received it, and the question was objected to on the part of the people, and the objection was sustained. We think that ruling was also erroneous. Upon the facts of the case as they were developed at the trial, it was claimed by the defendant that when he received the \$575 it was his intention to replace the stock to respond to Meeker whenever called upon for the stock, and that he was at the time able to do so. That was a theory he had a right to prove if he could, and the proof would bear upon the final issue whether he intended to cheat and defraud him, and hence he should have been permitted to answer the question.

"The judge charged the jury as follows: 'If you find that the defendant made the representations charged in the indictment, and that they were false, and that the defendant knew they were false when he made them, then the law presumes the fraudulent intent.' That portion of the charge was objected to by the defendant and we think the exception well founded. The crime of false pretenses is not made out by simply showing that the representations charged in the indictment were made, and that they were false, and that the defendant knew them to be false. The jury, from those facts and from all the other facts, may infer a fraudulent intent; but the law does not presume a fraudulent intent; that is to be found as a fact by the jury, and is not an inference of law."

Judge Thompson says: "It has been held, on the trial of an indictment for an assault and battery with intent to commit a rape, that the accused might testify as to what his intention was in the commission of the assault and battery. So, on the trial of an indictment for larceny, it is competent for the defendant to testify as to what his intention was at the time the goods came

into his possession. So, where the question concerns the intent with which an assignment of property has been made, it is competent for the assignor to testify what his intentions were. So, where the validity of a deed, or of an official act, is in question, it is competent for the grantor to testify that he executed it in good faith. And in general, it may be stated that, where the intent is an essential element in the charge of crime, the prisoner has the right to testify as to intent in doing the act. Nor is it necessary to the operation of the rule that the witness should be a party to the action. More broadly, the rule is, that where the motive of the witness, in performing a particular act or making a particular declaration, becomes a material issue in the case, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty in furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested party. Some courts, however, hold that, where a party takes the stand as a witness in his own behalf in civil and criminal cases, it is incompetent for him to testify as to an uncommunicated opinion, belief or motive on which he acted. It is clear that a party cannot be allowed to testify to his undisclosed intent in order to alter the effect of that which was matter of contract, representation, or estoppel, on which the other party had a right to rely." 1 Thomp. Trials, § 383, citing *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595; *Watkins v. Wallace*, 19 Mich. 57; *Thacher v. Phinney*, 7 Allen, 146; *Cortlandt County Supt. of Poor v. Herkimer County Supt. of Poor*, 44 N. Y. 22; *Kerrains v. People*, 60 N. Y. 221, 14 Am. Rep. 158; *People v. Baker*, 96 N. Y. 340; *Seymour v. Wilson*, 14 N. Y. 567; *Homans v. Corning*, 60 N. H. 418; *McKown v. Hunter*, 30 N. Y. 625; *Starin v. Kelly*, 88 N. Y. 418; *Griffin v. Marquardt*, 21 N. Y. 121; *Forbes v. Waller*, 25 N. Y. 430; *Columbus v. Dahn*, 36 Ind. 330; *Whizenant v. State*, 71 Ala. 383; *Ford v. State*, 71 Ala. 385; *McCormick v. Joseph*, 77 Ala. 236.

In *Forbes v. Waller*, *supra*, it was held proper to prove by the assignor his object and intent in making the assignment, and to prove by him that it was to prevent a sacrifice of the general principle is where the motive of a witness in performing a particular act or making a particular declaration becomes a material issue in a cause, or reflects important light upon such issue, he

may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness. *McKown v. Hunter, supra.*

§ 289. **Digest Form of the Present Rule.**—In digest form the rule would find expression in this language: When a criminal intent is imputed to a person or forms an element of a crime with which he is charged, he is privileged to deny the intent when on examination as a witness in his own behalf, and he may support his denial of this criminal intent by his own testimony as to the alleged offense. *Babcock v. People*, 15 Hun, 347; *Wheelden v. Wilson*, 44 Me. 1; *Quimby v. Morrill*, 47 Me. 470; *Snow v. Paine*, 114 Mass. 520; *White v. State*, 53 Ind. 595; *People v. Farrell*, 31 Cal. 576; *Bode v. State*, 6 Tex. App. 424; *Blodgett Paper Co. v. Farmer*, 41 N. H. 403; *Edwards v. Currier*, 43 Me. 474; *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196; *White v. Tucker*, 16 Ohio St. 468; *Jones v. Howland*, 8 Met. 377, 41 Am. Dec. 525; *Lawton v. Chase*, 108 Mass. 241; *Miner v. Phillips*, 42 Ill. 123; *Watkins v. Wallace*, 19 Mich. 57; *Berkey v. Judd*, 22 Minn. 287; *Greer v. State*, 53 Ind. 420; *Bloch v. Price*, 24 Mo. App. 14.

§ 290. **When Conviction may be Had in the Absence of Criminal Intent.**—A malicious or criminal intent is not an essential ingredient of every crime. Thus gross carelessness or momentary inattention may result in great loss of life, and there may be an entire absence of criminal intent; and yet the party offending may be prosecuted criminally and convicted on evidence showing mere carelessness or inattention. As an illustration, there was no evidence of criminal or malicious intent on the part of the brakeman Parker, who caused the fearful destruction of life on the Hudson River Railroad. Still, he was indicted, tried and sentenced as a criminal. This rule which repudiates the evidence of a criminal intent is vindicated by the recent case of *People v. Kibler*, 106 N. Y. 321.

The act alone, irrespective of its motive, constitutes the crime. That conclusion was necessarily involved in the decision of *People v. Cipperly*, 101 N. Y. 634, 37 Hun, 323.

There is no doubt that in civil cases the legislature can make certain facts prima facie evidence of another fact. *Howard v.*

Moot, 64 N. Y. 262; *Hand v. Ballou*, 12 N. Y. 543. And it has been held competent for the legislature to provide that certain facts, having a tendency to prove the existence of another fact, shall, in criminal cases, be prima facie evidence of the latter fact. *Com. v. Williams*, 6 Gray, 1. But the court was careful to hold that the presumption might be repelled by the circumstances or by other proofs. *Com. v. Wallace*, 7 Gray, 222; *Com. v. Rowe*, 14 Gray, 47. The legislature cannot make certain facts conclusive evidence which in their nature are not so. *People v. Lyon*, 27 Hun, 180. Evidence to secure a conviction should be such as to satisfy "the judgment of his peers," or of whatever tribunal that determines the fate of the accused. The various legislatures may prescribe rules for the admission of evidence, but cannot compel the trial court to hold it conclusive of the defendant's guilt, without regard to that court's conviction or judgment as to its conclusiveness. If the legislature can compel the courts to render judgment contrary to their convictions of the truth, produced by the evidence, then the legislative power can coerce the judicial power; a proposition destructive of the co-ordinate departments of the government. *People v. Cipperly*, 37 Hun, 319.

§ 291. **Time not Necessary to Form Criminal Intent.**—No time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it. But this expression must be qualified lest it mislead. It is true that such is the swiftness of human thought, that no time is too short, in which a wicked man may not form a design to kill, and frame the means of executing his purpose. Yet this suddenness is opposed to premeditation and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and premeditate. *Weston v. Com.* 111 Pa. 251.

§ 292. **Review of the Authorities.**—A review of the decisions cannot be uninteresting, thus: In the case of *Com. v. Mash*, 7 Met. 472, Judge Shaw, in reply to a suggestion that where there is no criminal intent there can be no guilt, said: "The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he of course intends to do. If the statute has made it criminal to do an act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent to do that act." *Com. v. Gray*, 150 Mass. 327.

One of the most singular cases that can be found in the annals of criminal law sustaining any affinities to this topic, is *State v. Myers*, 82 Mo. 558. As this case was appealed on the express ground that the trial court admitted incompetent evidence, and as the opinion which determined that appeal contains a singularly exhaustive citation of authority and met with the concurrence of the entire court, I subjoin the text of the decision as reported.

"The action of the trial court in admitting certain evidence is assigned for error. To properly understand this issue it is important to explain the nature of the 'trick' by which the defendant is charged to have attempted to obtain money from Beard. Beard's testimony was, that the defendant came into the store and asked for a nickel's worth of tobacco. It was handed to him, and in payment he handed Beard a two-dollar bill. Beard returned him a silver dollar and ninety-five cents in change. Defendant dropped the dollar in silver in his pocket, and said he had found a nickel, and laying it on the counter with the other ninety-five cents, said he would rather have a dollar piece for it. Thereupon Beard took from the drawer a silver dollar and laid it down. Whereat the defendant remarked that he believed he would rather have the two dollar bill than the silver, and requested Beard to give it to him and take the two dollars in silver on the counter. Whereat Beard reminded him that he had put the dollar in his pocket, and to hand him that. The prisoner then took up his dollar in change and walked out. The prosecuting attorney then introduced other witnesses, by whom he proved, against the objection of defendant, that on the same day near the same time, both before and after the act in question, in the same village, the defendant attempted the same trick on other clerks, and was heard to say to his companion that he had 'knocked them down

for a one,'—alluding to a house which he had just left, and further stated that 'my partner has done the town for \$10, and we are getting drunk on the money, or over it.' The prosecuting attorney stated at the time, that this evidence was introduced for the purpose of showing the intent with which the act under investigation was done.

"As this presents an important question in the administration of criminal law, about which there is some contrariety of opinion, I have given it much consideration and investigation. It is a general rule that a distinct crime, for which the party might be separately proceeded against, cannot be given in evidence against the prisoner on trial for a single offense. It rests upon the equitable and humane principle that it is unjust to raise a presumption of guilt against the prisoner, on the idea that having committed one offense the moral obliquity or depravity it exhibits makes it probable he would commit another. And as it is difficult to guard against the blunder of the average jury in failing to distinguish the real purpose for which such evidence is admitted, as against the bad impression it would likely make on them as to the prisoner's general character, it is contended that it would be safer to exclude it under all circumstances. But the rule has its exceptions, now too deeply and firmly settled not to recognize them. They are exceptions founded in as much wisdom and justice as the rule itself. The most generally recognized exception is to admit other similar acts for the purpose of proving the guilty knowledge of the prisoner in cases of indictments for uttering, or having in his possession false notes, bills of exchange, bank bills, instruments for forging the same and counterfeit coin, and recent possession of stolen property. 1 Lead. Crim. Cas. 189; Roscoe, Crim. Ev. 90; *Com. v. Coe*, 115 Mass. 481; *Heard v. State*, 9 Tex. App. 1. The exception also extends to admitting other like acts as proof of the scienter in obtaining money under false pretenses, as in the instance of falsely representing the bill of an insolvent bank to be good whereby the prisoner fraudulently obtained property. *Com. v. Stone*, 4 Met. 43. So on an indictment for knowingly delivering skimmed milk to a factory, to be manufactured into cheese, with intent to defraud, evidence of transactions of the same character, other than that named in the indictment, has been admitted for the purpose of showing guilty knowledge. *Bainbridge v. State*, 30 Ohio St. 265. In a comparatively recent

case (*Reg. v. Francis*, L. R. 2 C. C. 128, 12 Cox, C. C. 612), the prisoner obtained money by pretending that a certain ring contained diamonds, when in fact it was composed only of crystals. To sustain the charge of criminal fraud, evidence was given by the crown that on a prior occasion the prisoner obtained money by falsely representing that a chain only coated with gold was made of pure gold. Lord Coleridge, *Ch. J.*, who delivered the judgment, said: 'It seems clear on principle that when the act charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake.'

* * * * *

"In *Rex v. Winkworth*, 4 Car. & P. 444, the prisoner came with a mob to prosecutor's house, and one of the mob went up to him and very civilly advised him that he would better give the mob something to get rid of them, which he did. For the purpose of showing that this was not disinterested and honest advice, the prosecutor introduced evidence that this mob at other houses demanded money on the same day while the prisoners or some of them were with him. The competency of it was affirmed by such judges as Park, Vaughn, Alderson and Lord Tenterden. In *Reg. v. Garner*, 3 Fost. & F. 681, on the trial of the husband and wife for the murder of his mother by poison, evidence was admitted to show that the former wife of the prisoner died in the same way, 'with a view to enable the jury to determine as to whether such was accidental or not.' See 1 Greenl. Ev. 53; 3 Russell, Crimes, §§ 285, 288; Roscoe, Crim. Ev. 86, 89.

"The American authorities are, if anything, more pronounced in favor of the competency of this evidence. *Bottomley v. United States*, 1 Story, 135, was a proceeding by information on a libel of seizure of goods imported and concealed in fraud of the impost laws. The government on the trial introduced evidence of former similar acts of the libelee to show the criminal intent of the act in question. Story, *J.*, held the proof competent *inter alia* 'to repel the suggestion that the act might be fairly attributable to accident, mistake, or innocent rashness, or negligence.' *Arguendo*, he said: 'In all cases where the guilt of the party depends

upon the intent, purpose or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part for the purpose of establishing such guilty intent, design, purpose or knowledge.' This question came again before this same learned judge, when on the supreme bench of the United States in the case of *Wood v. United States*, 41 U. S. 16 Pet. 342, 10 L. ed. 987; which was a proceeding similar to the case just cited. For the purpose of showing the fraudulent intent on the libelee the government introduced evidence of other fraudulent invoices, etc. Story, *J.*, in delivering the opinion, said: 'The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as civil cases, to introduce evidence of other acts and doings of a party of a kindred character, in order to illustrate or establish his intent or motive, in the particular act directly in judgment. Indeed in no other way would it be practicable in many cases to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. They constitute exceptions to the general rule, excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the point in issue, is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive.' After stating the exception in favor of the admission of such evidence in proof of guilty knowledge in cases of forgery, uttering false notes and passing counterfeit money, etc., he adds: 'Cases of fraud present a still more stringent necessity for the application of the same principle; for fraud being essentially a matter of motive and intention, is often deducible from a great variety of circumstances, no one of which is absolutely decisive; but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy.'

"In *Osborne v. People*, 2 Park. Crim. Rep. 583, this rule was recognized and applied. The court said: 'The acts of the prisoner while in the store rendered it somewhat doubtful whether

the entry was a burglary or a trespass, hence the necessity of the proof to show the intent.' And in *People v. Wood*, 3 Park. Crim. Rep. 681, evidence of prior offenses, of a similar character, more or less connected with that on trial, was admitted, not for the purpose of proving the act under investigation, but 'distinctly and solely for the purpose of establishing the *quo animo*, the motive existing in the mind of the prisoner,' in committing the act for which he was indicted. In *Com. v. Turner*, 3 Met. 19, this question is ably considered by the supreme court of Massachusetts. Turner was indicted jointly with one Shearer for kidnapping a negro boy in Massachusetts and running him off to Virginia. For the purpose of showing that Turner was acting with a guilty intent in connection with Shearer, the prosecution introduced evidence to the effect that on the morning of the day of the alleged abduction Turner was in company with Shearer, inquiring after another colored boy, and also, that on the previous day Turner endeavored to procure a colored boy from the overseer of the poor at the alms-house under false pretenses. After stating the general rule, and the exception in admitting such proof to establish the scienter when material, Dewy, *J.*, says: 'Evidence of other acts than those connected immediately with the act charged are always admissible, where the intent of the defendant forms a material part of the issue, and where those facts can be supposed to have any proper tendency to establish the intent. . . . The intent and purpose of the defendant, in obtaining the custody and possession of the individual alleged to be unlawfully taken, were to be inferred from circumstances, and necessarily opened a wide door for the introduction of evidence of the acts of the party accused, having any reasonable degree of connection with the particular act complained of. It was with the view of fixing the character of the last act, that evidence was received of the conduct and declarations of the defendant on the day previous, and at another place, and in reference to another individual. . . . With reference to such purpose, and thus limited, it seems to us to have been properly admitted.'

"It would be difficult to find in a like discussion a case more parallel in its facts and principles than that of *Trogdon v. Com.* 31 Gratt. 862, in which this matter is received most thoroughly by that eminent jurist, Staples, *J.* The prisoner was indicted for obtaining goods from M. & Co. upon false pretenses. On the

trial the commonwealth introduced evidence to the effect that the accused, in the same city and at or about the same time, purchased goods from other parties upon like false pretenses; for the purposes of showing the intent of the accused in making the representations to M. & Co., it was held admissible for this purpose, and the decision is placed throughout upon the ground that the evidence bore upon the question of the fraudulent intent with which the act was done. The authorities are collected and reviewed with a master's hand; and they sustain the proposition contended for beyond any reasonable controversy.

"In answer to the suggestion of the counsel for the prisoner, that when the prisoner did the act in question, as it was proved he did, the jury must infer the intent from the act; and therefore evidence of collateral facts is unnecessary and irrelevant, and calculated to mislead the jury, the court said: 'It may be conceded that when goods are obtained by false representations, the jury may justly infer the fraudulent intent. But it frequently happens in a large majority of cases, there are numerous facts and circumstances, sometimes of a minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions of the accused to show the guilty intent, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? What would be thought of a judge who would thus prejudice the case and invade the province of the jury? The learned counsel would hardly concede the fraudulent intent of his client upon any state of facts. . . . We are asked to say that the evidence set out in the bill of exceptions is irrelevant, upon the assumption that without it the jury must have found the guilty intent on the part of the accused.' This and its cognates are fully sustained by the following cases: *Friend v. Hamill*, 34 Md. 298; *Cary v. Hotailing*, 1 Hill, 311, 37 Am. Dec. 323; *Phillips v. People*, 57 Barb. 354; *Rowley v. Bigelow*, 12 Pick. 311, 23 Am. Dec. 607; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Com. v. Tuckerman*, 10 Gray, 173; *McKenney v. Dingley*, 4 Me. 172; *Bielschowsky v. People*, 3 Hun, 40, affirmed in 60 N. Y. 616; *Miller v. Barber*, 66 N. Y. 559.

"It has been suggested that this doctrine is opposed by so great a jurist as *Judge Agnew* in the case of *Shaffner v. Com.* 72 Pa.

60. In the course of that opinion he says: 'To make one criminal act evidence of another, a connection must have existed between them in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.' The case was one which did not render such evidence material in ascertaining the intent of the party accused.

"Hence it is to be observed that he treats the question as if the attempt was made by the *nisi* court 'to make one criminal act evidence of another.' In such case, there can be no question but there should be such a connection between the two acts or offenses as to link them together in the mind of the actors, so as to make one follow the other as a means to an end. This was the state of the case in *State v. Greemwade*, 72 Mo. 298. The limitation of the rule as applied by Agnew, *J.*, *supra*, was proper, because there was no question, essentially, of guilty knowledge or intent, for as it said in the statement of the case: 'The evidence tended to show that she died of poison, and the principal question was whether the poison had been administered by the defendant.'

"In the case at bar the very gist of the offense charged is the criminal intent with which the act was done, and the burden of proof rests upon the state. *Anable v. Com.* 24 Gratt. 563. It must be shown affirmatively that the defendant's purpose was to defraud. Such intent is not a presumption of law, but is a fact to be found by the jury. *Trogdon v. Com.* 31 Gratt. 862. It has been held by the highest authority in this class of cases, that even the admission of the accused that the act was done with the criminal intent cannot preclude the state from proving it by any other competent testimony, for the jury are the sole judges of the evidence. *Com. v. McCarthy*, 119 Mass. 354; *Priest v. Groton*, 103 Mass. 530. Under the facts of this case it was for the jury to say whether the act of the prisoner was a criminal act, done with a fraudulent intent to obtain the money of the clerk, or whether it was a mistake of effort merely to practice upon him a joke. The jury, without violence to reason, under an instruction to give the prisoner the benefit of every reasonable doubt, have convicted him. The prosecuting attorney, as suggested by Staples, *J.*, *supra*, and by Roscoe in his *Criminal Evidence*, p. 91, had the right to anticipate an obvious defense of the prisoner that

it was a mistake or without criminal intent, and put in, in the first instance, all his evidence bearing on the issue. The evidence further showed that the prisoner started out on that day with the perpetration of the several acts linked together in his mind. His purpose was, to employ his own vulgar but suggestive terms, 'to do the town.' He did 'beat' the unwary out of \$10 by the same attempted 'trick.'" *State v. Myers*, 82 Mo. 562. ,

CHAPTER XXXVIII.

CORPUS DELICTI.

- § 293. *The Term Defined.*
- 294. *Full Proof of not Required.*
- 295. *What must be Shown.*
- 296. *Cannot be Proved by Uncorroborated Confessions.*
- 297. *May be Shown by Circumstantial Evidence.*
- 298. *Recent Legislation on this Subject.*
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§ 293. **The Term Defined.**—The *corpus delicti* comprehends the essential elements of an offense—the fact that the particular crime alleged has been actually committed.

The *corpus delicti* must be proved like any other fact, that is, beyond a reasonable doubt, and that doubt is for the jury. A confession alone is not regarded as sufficient proof. The state must first produce sufficient evidence to send the case to the jury and the jury are first to be satisfied, from that evidence, that the crime has been committed.

The doctrine applies to other crimes, as, larceny. The possession of the fruits of a crime may do away with direct proof of the *corpus delicti*. See Anderson, Law Dict. title *Corpus Delicti*, citing, *inter alia*, *Gray v. Com.* 101 Pa. 386, 47 Am. Rep. 733; *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 311, 27 L. ed. 125; *Udderzook v. Com.* 76 Pa. 340; *Pitts v. State*, 43 Miss. 480, 482; *United States v. Williams*, 1 Cliff. 25; *Johnson v. Com.* 85 Ky. 377, 4 Crim. L. Mag. 902, 912.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body. Best, Presumptions, 201; 1 Stark. Ev. 575. See *Rex v. Yend*, 6 Car. & P. 176; 2 Hale, P. C. 290. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offense, has made his appearance alive. The wis-

dom of the rule is apparent; but it has been questioned whether, in extreme cases it may not be competent to prove the basis of the *corpus delicti*, by presumptive evidence. 3 Bentham, Judicial Ev. 234; Wills, Circ. Ev. 105; Best, Presumptions, 204. See 1 Bouvier, Law Dict. title *Corpus Delicti*.

The *corpus delicti* consists not merely of an objective crime, but of the defendant's agency of the crime; and it is well settled that, unless the *corpus delicti* in both these respects is proved, a confession even is not by itself enough to sustain a conviction. It must be corroborated. This can seldom be done by direct or positive testimony, but it may as well be shown by circumstantial evidence. *Willard v. State*, 27 Tex. App. 386.

§ 294. **Full Proof of not Required.**—"Full proof," said Nelson, *Ch. J.*, in *People v. Badgley*, 16 Wend. 59, "of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient."

Nor is it necessary that the *corpus delicti* should be proved by direct and positive evidence; it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be equally needless and absurd.

While direct evidence of the *corpus delicti* is always desirable, it should not be held indispensable. To so hold would, in many cases, give immunity to crime, especially in the class of cases to which this belongs. There is some conflict of authority; but we regard this as a better doctrine. If, however, circumstantial evidence is relied upon for this purpose, it should be such as to exclude all reasonable doubt. 1 Bishop, *Crim. Proc.* § 1071; *Roberts v. People*, 11 Colo. 213.

§ 295. **What must be Shown.**—Every allegation of the commission of legal crime involves the establishment of two distinct propositions; namely, that an act has been committed from which

legal responsibility arises, and that the guilt of such act attaches to a particular individual, though the evidence is not always separable into distinct parts, or applicable to each of those propositions.

Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offenses which have never existed, that it is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer, or be involved in the consequences of guilt without satisfactory proof of the *corpus delicti*, either by direct evidence, or by cogent and irresistible grounds of presumption. *Rex v. Burdett*, 4 Barn. & Ald. 123. If it be objected that rigorous proof of the *corpus delicti* is sometimes unattainable, and that the effect of exacting it must be that crime will occasionally pass unpunished, it must be admitted that such may possibly be the result; but it is answered that, where there is no proof, or, which is the same thing, no sufficient legal proof of crime, there can be no legal criminality. In penal jurisdiction there can be no middle term; that the party must be absolutely and unconditionally guilty or not guilty.

Burrill, in his work on Circumstantial Evidence, page 682, lays down the correct rule. He says: "A dead body or its remains having been discovered and identified as that of the person charged to have been slain, and the basis of the *corpus delicti* being thus fully established, the next step in the process, and the one which seems to complete the proof of that indispensable preliminary fact, is to show that the death has been occasioned by the criminal act or agency of another person. This may always be done by means of circumstantial evidence, including that of the presumptive kind; and, for this purpose, a much wider range of inquiry is allowed than in regard to the fundamental fact of death; and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration."

§ 296. **Cannot be Proved by Uncorroborated Confessions.**—There is abundant authority and little dissent to the proposition that extra-judicial confessions alone, uncorroborated by other evidence, are inadequate to establish *corpus delicti*. *Brown v. State*, 32 Miss. 433; *People v. Badgley*, 16 Wend. 53; *State v. Scott*, 39 Mo. 424; *Jenkins v. State*, 41 Miss. 582; *People v. Jones*, 31 Cal. 565; *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247;

Smith v. Com. 21 Gratt. 809; *People v. Ruloff*, 3 Park. Crim. Rep. 401; *Territory v. McClin*, 1 Mont. 394; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *Blackburn v. State*, 23 Ohio St. 146; *People v. Thrall*, 50 Cal. 415; *United States v. Mulvaney*, 4 Park. Crim. Rep. 164.

In the case of *Ruloff v. People*, 18 N. Y. 179, "prisoner's counsel . . . moved the court to stop the trial for want of proof of the *corpus delicti*; and invoked the protection of the rule laid down by Lord Hale, that no person should be convicted of murder or manslaughter, unless the facts were proved to be done, or at least the body found dead." The motion was sustained. In the course of a well reasoned opinion by Chief Justice Johnson, the following exposition of the subject under review occurs :

"The *corpus delicti* as it is termed in the law, by which is meant the body of the crime, the fact that a murder has been committed must be clearly and conclusively proved by the government.

"The *corpus delicti* is made up of two things : first, of certain facts forming the basis of the *corpus delicti*, by which is meant the fact that a human being has been killed; and second, the existence of criminal and human agency as the cause of the death. Upon this first branch of the case, the prisoner's counsel insists that it can only be proved by direct and positive evidence, that the government must prove the fact of death by witnesses who saw the killing, or at least the dead body must be found. It has been said by some judges that a conviction for murder ought never to be permitted unless the killing was positively sworn to or the dead body was found and identified. This, as a general proposition, is undoubtedly correct, but, like other general rules, has its exceptions. It may sometimes happen that the dead body cannot be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, when the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body cannot be found, nobody can doubt that the author of such a crime is guilty of murder. In such a case, the law permits the jury to infer that death has ensued from the facts proved; the circumstances being such as to exclude the least, if not almost every probability, that such a person could have escaped with life; and yet there is a bare possibility in such a case that the person could have escaped with life.

"I am of opinion that the rule, as understood in this country, does not require the fact of death to be proved by positive and direct evidence in cases where the discovery of the body, after the crime, is impossible. In such cases the fact may be established by circumstances, where the evidence is so strong and intense as to produce the full certainty of death. By the proof of a fact by presumptive evidence, we are to understand the proof of facts and circumstances from which the existence of such fact may be justly inferred. The facts and circumstances to establish the death in the case of murder, in the absence of any positive evidence, must be so strong and intense as to produce the full certainty of death, or, as Mr. Wills says, 'the death may be inferred from such strong and unequivocal circumstances as render it morally certain, and leave no ground for reasonable doubt.'" *Ruloff v. People*, 18 N. Y. 182.

The *corpus delicti* must be established by evidence independently of the confession. *State v. Guild*, 10 N. J. L. 193; *State v. Dubois*, 54 Iowa, 363; *May v. State*, 92 Ill. 343; *Pitts v. State*, 43 Miss. 472; *Gray v. Com.* 101 Pa. 386, 47 Am. Rep. 733; *Priest v. State*, 10 Neb. 393; *United States v. Searcey*, 26 Fed. Rep. 435; *Hope's Case*, 1 City Hall Rec. 150; *People v. Badgley*, 16 Wend. 53; *People v. McGloin*, 91 N. Y. 242; Whart. Am. Crim. L. § 633; Bishop, Crim. L. § 1071.

On the whole, the doctrine may be said to be, that special care should be exercised as to the *corpus delicti*, and there should be no conviction except where this part of the case is proved with particular clearness and certainty. Hence the rule as to purely uncorroborated confessions out of court. Alone, they are never quite satisfactory proof; which the evidence, whether circumstantial or correct, must be, to establish the *corpus delicti*. This is the substance of the doctrine, but some judges spin it a little more finely. Bishop, Crim. Proc. § 1059, citing *Smith v. Com.* 21 Gratt. 809; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *State v. Keeler*, 28 Iowa, 551; *Fuller v. State*, 48 Ala. 273; *Pitts v. State*, 43 Miss. 472; *State v. Hogard*, 12 Minn. 293; *State v. McGowan*, 1 S. C. 14; *Taylor v. State*, 35 Tex. 97; *People v. Wilson*, 3 Park. Crim. Rep. 199; *Sam v. State*, 33 Miss. 347; *State v. Williams*, 52 N. C. 446; *Tyner v. State*, 5 Humph. 383; *Burton v. March*, 51 N. C. 409; *Phillips v. State*, 29 Ga. 105.

§ 297. May be Shown by Circumstantial Evidence.—An

intelligent commentary upon this subject is from the Kentucky court of appeals, as the following language will indicate: "The only question presented is whether the *corpus delicti*, the fact that the crime of murder has been perpetrated, must be established by direct proof of the killing, or by an inspection of the body; or whether the death may not be established by circumstantial evidence, as any other fact in the case is established. We think there can be no doubt that circumstantial evidence is competent to establish the fact that the person charged to have been murdered is dead. The production of the body is certainly the most conclusive, if not the best evidence of that fact, but in the very nature of crimes this is not always possible." *Johnson v. Com.* 85 Ky. 377, 4 Crim. L. Mag. 902. See also *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

An early New York case of great celebrity was reasoned on similar lines by *Chief Justice Johnson*. "The *corpus delicti*, in murder, has two components, death as the result and the criminal agency of another as the means. It is only where there is direct proof of one that the other can be established by circumstantial evidence." *Ruloff v. People*, 18 N. Y. 179. And a very recent decision of the Illinois supreme court supports the same view. "Nor is it essential that the *corpus delicti* should be established by evidence independent of that which tends to connect the accused with its perpetration. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence." *Carroll v. People*, 136 Ill. 463.

The English judges have universally adopted a similar ruling and proof of the *corpus delicti* by circumstantial evidence is in all cases permissible.

Mr. Justice Holroyd has said: "No man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the

receiving and giving due effect to such proof. The presumptions arising from those proofs should, no doubt, and most especially in cases of great magnitude, be duly and correctly weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence." Of similar tenor are the remarks of *Mr. Justice Bayley*: "No one can doubt that presumptions can be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there are sufficient premises to warrant the conclusion." *Lord Chief Justice Abbott* supports the same view: "A fact must not be inferred without premises which will warrant the inference; but if no fact could be thus ascertained by inference in a court of law, very few offenses would be brought to punishment. In a great proportion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given; the man who is charged with theft is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup.' The law on this point was also very emphatically declared by *Mr. Baron Parke* in *Tawell's Case*. His lordship said: 'The jury had been properly told by the counsel for the prosecution that circumstantial evidence is the only evidence which can in cases of this kind lead to discovery. There is no way of investigating them except by the use of circumstantial evidence; but Providence has so ordered the affairs of men that it most frequently happens that great crimes committed in secret leave behind them some traces, or are accompanied by some circumstances which lead to the discovery and punishment of the offender; therefore the law has wisely provided that you need not have, in cases of this kind, direct proof, that is, the proof of eye-

witnesses, who see the fact and can depose to it upon their oaths. It is impossible, however, not to say that it is the best proof, if that proof is offered to you upon the testimony of men whose veracity you have no reason to doubt; but on the other hand it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it, or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye witnesses. This being a case of circumstantial evidence, I advise you,' said the learned judge, 'as I invariably advise juries, to act upon a rule that you are first to consider what facts are clearly, distinctly, indisputably proved to your satisfaction; and you are to consider whether those facts are consistent with any other rational supposition than that the prisoner is guilty of that offense. If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistance to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that cannot much influence your minds; for we all know that crimes are committed, and, therefore, the existence of the crime is no inconsistency with the other circumstances, if those circumstances lead to that result. The point for you to consider is, whether, attending to the evidence, you can reconcile the circumstances adduced in evidence with any other supposition than that he has been guilty of the offense. If you cannot, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such supposition. All that can be required is, not absolute, positive proof, but such proof as convinces you that the crime has been made out.'" See Wills, *Circ. Ev.* (6th ed.) 202-204.

Blackstone says: "All presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer, and Sir Matthew Hale, in particular, lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing, etc.; and 2. Never to convict any person of murder or manslaughter, till at least the body be found dead." 4 Bl. Com. 358.

In 2 Best on Presumptions, p. 780, it is said that "every criminal charge involves two things; first, that an offense has been

committed; and, second, that the accused is the author, or one of the authors of it;" and, the learned writer adds: "The identification of the body of the deceased need not be proved by witnesses, who, by an actual inspection of the body, recognize it as the body of the person with whose murder the prisoner is charged; but it may be by the same class of proof as is used to identify the prisoner on trial, or any other material facts. . . . Indeed, it may be said that any proof that satisfies the jury that the body is that of the deceased is sufficient, as fragments of the clothing identified as similar to that worn by the deceased when last seen alive." 1 Starkie on Evidence, p. 575, defines the *corpus delicti* as "the fact that the crime has been actually perpetrated," and 3 Greenleaf on Evidence, § 131, as "the fact that a murder has been committed," and adds that the rule requires "unequivocal and certain proof that someone is dead." All these cases and authors hold, without exception, that until a criminal fact has been established, "*antequam de crimine constiterit*," there can be no basis for presumptive proof, but when, in a case of murder, that basis has been certainly supplied, the identity of the victim and the agency of the prisoner may be shown by circumstances.

So far as I have been able to discover, that rule has always been recognized and applied in this country. A few of the more remarkable cases may be studied to demonstrate its wide prevalence. In *People v. Wilson*, 3 Park. Crim. Rep. 199, it appeared that a dead body, with marks of violence upon it, had been washed ashore. It was alleged to have been the body of Captain Palmer for whose murder the prisoner was being tried. No direct evidence of that identity was or could be given. But the criminal fact of a death, by violence, having been fully established, the identity of the remains was proved by circumstances. Personal recognition had become impossible, and identity was established by an inference from resemblances. The height of deceased was shown, an unusual length of face, and a widening of the end of the little finger, to which, in a general way, the body corresponded. But a more important fact was that the captain had imprinted his name upon his leg and arm, and in the same portions of the body found the skin had been cut away, except that on the leg the letter P remained visible. A brother-in-law of deceased, who had seen the body, was asked the direct question, whose body it was; but the court would not permit an answer;

saying that the question was not the ordinary one of personal identity, since the body had been submerged for five months, but was one of an inference from resemblances, which the jury and not the witness must draw. The prisoner was convicted. In *Com. v. Webster*, 5 Cush. 295, the identification stood mainly upon a block of teeth found in the furnace where part of the body was consumed. There was no direct recognition of the body by any one, but the circumstantial evidence was very strong. I do not see how the identification of the false teeth can be deemed direct evidence of the identity of the remains. It was a fact from which that identity could be inferred, and the inference be very strong, but the conclusion would still be an inference. If Dr. Keep, the dentist, after examining the teeth, had been asked the direct question whether the mutilated remains were those of the deceased, he could only have answered in the affirmative, as a judgment founded upon a process of reasoning. False teeth are artificial and not natural. They may be worn at one time and omitted at another. They may be lost from the mouth and pass into a stranger's possession. If their identity as found among the remains directly identified the body, why did not in the present case the proved identity of the boot found on the foot of the body discovered directly identify that body? Is not the difference rather one of the degree than of the kind of proof? But in both cases I think the evidence was inferential, and cannot justly be regarded as direct. In *Taylor v. State*, 35 Tex. 97, there was no direct proof of the identity of the deceased, but his clothing, hat and papers were identified, and his wagon and team and even his dog were found in the prisoner's possession. A still more remarkable case was that of *State v. Williams*, 52 N. C. 446, where with the bones were found some trifling articles of feminine attire, seemingly insufficient to justify an inference of identity.

§ 298. **Recent Legislation on the Subject.**—The well recognized rules as to *corpus delicti* have assumed a statutory form in the state of New York, and the Penal Code after defining homicide to be the killing of one human being by the act, procurement or omission of another, and declaring the crime to classify under the head of either (1) murder; (2) manslaughter; (3) excusable homicide; or (4) justifiable homicide, proceeds with the declaration that, "no person shall be convicted of manslaughter or murder unless the death of the person alleged to have been killed

and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." New York Penal Code, §§ 179-181.

In construing a statute everything in favor of the liberty and the security of the citizen and the protection of the individual is to be liberally and comprehensively interpreted. Potter's Dwar. Statutes, 49; Lieber, Hermeneutics [16th ed. 1880], chap. 5, § 134; *People v. Kelly*, 24 N. Y. 74, 81, 82; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746.

"By the *corpus delicti*, the body or substance of the offense, has always been meant the existence of a criminal fact. Unless such a fact exists there is nothing to investigate. Until it is proved, inquiry has no point upon which it can concentrate. Indeed, there is nothing to inquire about. But, when a criminal fact is discovered, its existence, for the purpose of a judicial investigation, must be established fully, completely, by the most clear and decisive evidence. For otherwise the after reasoning founded upon it and drawing its force from it will be dangerous, fallacious, and unreliable. As the weakness of the foundation is more and more intensified, while the superstructure ascends and the weight grows, so the circumstantial evidence built upon a criminal fact, not certain to have existed, becomes itself weak and indecisive, and more and more so as the suspicions expand and extend. If somebody has been murdered a motive for a murder becomes a significant fact, rendered more so when identification shows it a motive for the particular murder. But if the death is doubtful the probative force of a motive dwindles to mere suspicion." *People v. Palmer*, 109 N. Y. 113.

The provision of the Penal Code in the section above referred to, which prohibits a conviction "of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt," does not require direct proof of the identity of the victim, but only of the death. Identity is not included in the *corpus delicti*, and is left open to indirect or circumstantial evidence. An intention to change the rule of the common law will not be presumed from doubtful statutory provisions; the presumption is that no such change was intended unless the statute is explicit and clear in that direction. *People v. Palmer, supra*.

A confession is no evidence of the *corpus delicti*, but only of the connection of the defendant with the crime; the *corpus delicti* is a substantive independent fact in the case, to be proved as if defendant were not a party to the cause, and so his unsworn statement is no more evidence of the *corpus delicti* than the hearsay statement of any other person. *State v. Guild*, 10 N. J. L. 193; *State v. Dubois*, 54 Iowa, 363; *May v. State*, 92 Ill. 343. Circumstantial evidence should be acted upon with great caution, especially where the public anxiety for the detection of a great crime creates an unusual tendency to exaggerate facts and draw rash inferences. *Pitts v. State*, 43 Miss. 472. All that the law requires is that the *corpus delicti* shall be proved, as any other fact, that is, beyond a reasonable doubt, and that doubt is for the jury. *Gray v. Com.* 101 Pa. 386, 47 Am. Rep. 733; *Priest v. State*, 10 Neb. 393; *United States v. Searcey*, 26 Fed. Rep. 435; *People v. Porter*, 2 Park. Crim. Rep. 14; *Hope's Case*, 1 City Hall Rec. 150; *People v. Badgley*, 16 Wend. 53; *People v. McGloin*, 91 N. Y. 242, Bishop, Crim. L. § 1071.

The corroborative evidence must go to prove the entire crime, and not only one or more of its constituent elements; and proof of one element is no proof of another. *People v. Plath*, 100 N. Y. 590. The *quantum* of evidence, *aliunde* the confession, sufficient to convict, is not the same as suffices to corroborate an accomplice under section 399 of the Criminal Code, or a female under sections 283 and 286 of the Penal Code. *People v. Plath*, *supra*; *People v. Williams*, 1 N. Y. Crim. Rep. 344; *Frazer v. People*, 54 Barb. 310. In determining a question of fact from circumstantial evidence, the hypothesis of guilt should flow naturally from the facts proved and be consistent with them all; and the evidence must be such as to exclude, to a moral certainty, every hypothesis but that of guilt of the offense imputed. *People v. Bennett*, 49 N. Y. 137; *People v. Stokes*, 2 N. Y. Crim. Rep. 382; *People v. Kennedy*, 32 N. Y. 145, Lawson, Presumptions, 569; *Evans v. Evans*, 1 Hagg. Const. 105. If the facts be consistent with innocence, they are no proof of guilt. *Ormsby v. People*, 53 N. Y. 475; *People v. Courtney*, 28 Hun, 593; *Frazer v. People*, 54 Barb. 309; *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 491; *Port v. Port*, 70 Ill. 484; *Mason v. State*, 32 Ark. 239; *Carroll v. Quinn*, 13 Md. 379; *Greenwood v. Lowe*, 7 La. Ann. 197; *United States v. The Burdett*, 34 U. S. 9 Pet. 682, 9 L. ed. 273.

"It is insisted that under the statute the *corpus delicti* must be proved, or evidence given tending to prove it, wholly independent of the confession, and that no evidence was given, which, disconnected with the confessions, had a legal tendency to prove the body of the crime. It would be a sufficient answer to this point that it is not raised by any exception on the trial, and it clearly was not raised by the exception to the denial of a motion for a new trial, made after verdict. But we are of opinion that when, in addition to the confession, there is proof of circumstances which, although they may have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the requirement of the statute. The words of the statute, 'additional proof that the crime charged has been committed,' seem to imply that the confession is to be treated as evidence of the *corpus delicti*, that is, not only of the subjective criminal act but also the criminal agency of the defendant; in other words, as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction. 'Full proof,' said Nelson, *Ch. J.*, in *People v. Badgley*, 16 Wend. 53, 'of the body of the crime, the *corpus delicti*, independently of the confession is not required by any of the cases, and in many of them slight corroborating facts were held sufficient.' We are of opinion that there was evidence in addition to the confession, which constituted 'additional proof' within the statute." *People v. Jaehne*, 103 N. Y. 182.

That I have correctly stated what is meant by the *corpus delicti*, requiring direct proof, and that it never did include the identity of the victim, but left that open to indirect, or circumstantial evidence, is shown by an unbroken and unvarying concurrence of authority.

In *People v. Videto*, 1 Park. Crim. Rep. 609, Walworth, *Ch. J.*, says: "One rule however, which ought never to be departed from is, that no one should be convicted of murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there be other clear and irresistible proof that such person is actually dead."

It does not appear that this direction was material on that trial, and it is cited only to show how constantly the doctrine has been received as clear and undisputed law.

In *People v. Wilson*, 3 Park. Crim. Rep. 207, the cook of the schooner *Eudora* was indicted for the murder of the captain upon Long Island Sound; after five months a body floated on shore, which the prosecution claimed was shown to be that of the murdered man. Strong, J., who presided at the trial, charged the jury "that ordinarily there could be no conviction for murder until the body of the deceased was discovered. That there were several exceptions to the rule, however, as where the murder has been on the high seas, at a great distance from the shore, and the body had been thrown overboard, or where the body had been entirely consumed by fire, or so far that it was impossible to identify it. But, in the present case, the scene of the supposed tragedy was near the shore, and there was strong reason to suppose that if a murder had been committed, the body of the deceased would be discovered. The exception to the rule is, therefore, inapplicable, and the jury must be satisfied that the body discovered . . . was that of the murdered captain, before they could convict the prisoner."

In *Reg. v. Tawell*, cited in Wills, Circ. Ev. (3d ed.) 181, Baron Parke told the jury that "the only fact which the law requires to be proved by direct and positive evidence is the death of the party by finding the body, or, when such proof is absolutely impossible, by circumstantial evidence leading closely to that result—as where a body was thrown overboard, far from land, when it is quite enough to prove that fact without producing the body."

"The Texas statute following the liberal tendency of the Code Napoleon accurately states the rule as to *corpus delicti* that 'no person shall be convicted of any degree of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed.' Texas Penal Code, art. 549. Now, we assert that the death of the person charged to have been killed can be proved in no other manner—by no other evidence or circumstances than those named in the statute. The dead body or a portion of it must be found. The body or a portion thereof must not only be found, but must be identified as the body or a portion of the body of the person charged to have been killed. The death of the person must be established by proof of these facts, and the death cannot be established by any other evidence

or circumstance short of such proof. This the law requires, and whether this provision be wise or unwise is not for this court to determine. We will remark, however, that the fearful results consequent upon any other rule being adopted and followed are well known to all thoughtful readers and students of criminal jurisprudence." Hurt, *J.*, in *Puryear v. State*, 28 Tex. App. 73.

§ 299. **Intent of the Rule Requiring Proof of.**—The rule that the *corpus delicti* must be proved beyond a reasonable doubt was intended as a shield to prisoners, and must never be used as a sword. In the language of Lord Hale, "*tutius semper est errare in acquittando, quam in puniendo, ex parte misericordiæ, quam ex parte justitiæ.*"

The people in every case of homicide must prove the *corpus delicti* beyond a reasonable doubt, and if the prisoner claims a justification he must take upon himself the burden of satisfying the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification. When a man takes human life, upon which the law sets a high value, it is not sufficient for him to raise a reasonable doubt whether he was justifiable or not, but he must go one step further, and give satisfactory evidence that he was justified. This rule is sufficiently humane to the prisoner, and at the same time gives some protection to human life.

CHAPTER XXXIX.

EVIDENCE OF IDENTITY.

§ 300. *A Cautionary Paragraph.*

301. *Circumstances from which Identity may be Inferred.*

302. *Voice as Evidence of Identity.*

a. *Telephonic Communications.*

303. *Dress as a Means of Identification.*

304. *Perplexing Nature of this Grade of Evidence.*

305. *Cautionary Suggestions of Mr. Justice Taylor.*

§ 300. **A Cautionary Paragraph.**—"This branch of our subject, simple as it may seem, and free from difficulty in the estimation of those unaccustomed to reasoning on the topic, is, on the contrary, perhaps one of the most difficult questions with which courts and juries are called upon to deal. The change in the appearance of the person whose identity is in question, wrought by age, mode of life, hardships, toil and care, sometimes coupled with a skillful disguise; again, the want of perception and discrimination in the identifying witnesses; these and numerous other causes have led to numerous cases of mistaken identity, both in ancient and modern times, and in all civilized countries, as we shall see, in both civil and criminal causes. Sometimes position and estates are acquired by fraud, and again, the innocent is punished, and not unfrequently the guilty escapes, from a mistake in the personal identity. These questions are fraught with their dangerous consequences, and difficult in their solution, and are of the greatest importance in the affairs of men. But where is the remedy? It lies alone in caution and prudence. Observation and sad experience admonish courts and juries to the use of the utmost care, caution and prudence." Harris, Identification, § 3.

The cautionary suggestions of this paragraph are abundantly emphasized by a brief reference to the celebrated *Tichborne Case*, Feb. 28, 1872, MS. That an illiterate roving tramp could so impose upon people of marked intelligence as to induce eighty-five witnesses including the mother of the real heir to testify as to his identity, argues an appalling defect in human sagacity.

For 103 days this remarkable case engrossed the attention of one of the highest tribunals in Great Britain; and nothing but the searching and drastic cross-examination to which the imposter was subjected, dispelled the illusions that mistaken identity had evolved. The rule obtains in most of our jurisdictions that non-expert testimony is admissible upon all questions of identity. The exceptions to this rule will be hereafter considered; but in support of the general proposition we will cite the following: *Cunningham v. Hudson River Bank*, 21 Wend. 557; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149; *Holten v. Lake County Comrs.* 55 Ind. 194; *State v. Vittum*, 9 N. H. 519; *Com. v. Dowdican*, 114 Mass. 237; *Curtis v. Chicago & N. W. R. Co.* 18 Wis. 312; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Cooper v. State*, 53 Miss. 393; *People v. Rolfe*, 61 Cal. 541; *Hallahan v. New York, L. E. & W. R. Co.* 102 N. Y. 194; *Funston v. Chicago, R. I. & P. R. Co.* 61 Iowa, 452; *Clifford v. Richardson*, 18 Vt. 620; *Cooper v. State*, 23 Tex. 339; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Cottrill v. Myrick*, 12 Me. 222; *Colee v. State*, 75 Ind. 511.

The elaborate opinion in the *Tichborne Case*, *supra*, while distinguished by a great parade of unusual learning was rendered somewhat perplexing and obscure by the subtlety of the distinctions and the very artificial texture of the argument.

§ 301. **Circumstances from which Identity may be Inferred.**—"The liability to mistake must necessarily be greater where the question of identity is matter of deduction and inference, than where it is the subject of direct evidence. The circumstances from which identity may be thus inferred are innumerable, and admit of only a very general classification, of which the following are perhaps the most remarkable heads.

"Family likeness has always been insisted upon as a reason for inferring parentage and identity. In the *Douglas Case*, Lord Mansfield said: 'I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discrimi-

nancy of voice, a difference in the gestures, the smile, the other various things; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude, and action.' But in a case in Scotland, where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence. Tait, Ev. 443. And, in another Scottish case, a trial for child-murder, it was permitted, after proof that the child had six toes, to ask a witness whether any member of the prisoner's family had supernumary fingers and toes; though the inference to be deduced was evidently only matter of opinion. 1 Dickson, Ev. 14.

" . . . Circumstances frequently contribute to identification, by confining suspicion and limiting the range of inquiry to a class of persons, as where crimes have been committed by left-handed persons; or where, notwithstanding simulated appearances of external violence and infraction, the offenders must have been domestics; as in the case mentioned on a former page, of two persons convicted of murder, who created an alarm from within the house; but upon whom, nevertheless, suspicion fell, from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than inmates." Wills, Circ. Ev. 117.

§ 302. **Voice as Evidence of Identity.**—"In a Texas case on an indictment for arson in the burning of a house and fences in the night time, the owner hurried to the scene, and was shot at by the accused, he returned the fire, when he heard bitter oaths and vociferations emanating from the accused, whose voice he recognized and identified, having known him for thirteen years and lived within half a mile of him for many years. The court held that positive recognition of the defendant's voice, by one who was familiar with it, might suffice to identify the guilty party. In a Massachusetts case the accused was indicted for an attempt at arson in burning a house belonging to one Farnham, whose wife testified that she heard the voice of the accused on the day before the attempt at night, had heard it but the one time, and again that night, and recognized it and could identify it. This was held

competent." Harris, Identification, § 14, citing *Davis v. State*, 15 Tex. App. 594; *Com. v. Hayes*, 138 Mass. 186.

A defendant in a criminal case, not under oath as a witness, is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government, who testified that he identified the defendant by his voice. *Com. v. Scott*, 123 Mass. 222.

"Where the prisoner was in jail at the same time with the witness, though not in the same room, the witness testified to a conversation with the prisoner in which the prisoner confessed his guilt. He testified that he conversed with the accused through the soil pipes of the jail, and that he, the prisoner, confessed or admitted to him, the witness, that he was guilty of the charge on which he had been cast into prison, and that he knew the prisoner from his voice. The court upon this statement, with seeming reluctance, permitted it to go to the jury. *Held*, that it was competent to go to the jury, and that it was their province to consider it, and give it such weight as it might be entitled to." Harris, Identification, § 554, citing *Brown v. Com.* 76 Pa. 319. Similarly in a recent Massachusetts case, the testimony of a witness, identifying the defendant by his voice, was held competent. The weight of it was for the jury, but it was properly submitted to them, to be considered in connection with other evidence of identity. *Com. v. Williams*, 105 Mass. 62; *Com. v. Hayes*, 138 Mass. 183.

In *Com. v. Scott*, *supra*, the ruling was to the effect that though identification might be established by means of the voice, experiments in the court room were inadmissible. In *Rex v. Harrison*, 12 How. St. Tr. 850, conviction rested in part on identification of voice. See as to identification by voice, 3 Whart. & S. Medical Jurisprudence (4th ed.) § 634; Whart. Crim. Ev. § 803, *note*.

a. Telephonic Communications.—The authorities upon the subject of the telephone in evidence, although meagre, voice but one sentiment. They one and all recognize the extreme necessity of upholding the validity of telephonic communications to impress the characteristics of an admission, confession, statement or contract, and will admit the telephonic message in evidence; first where the parties are identified by means of the the voice; and secondly on the well recognized principle of agency. As regards identification, it may be said that notwithstanding the

metallic tone transmitted under certain atmospheric conditions it is matter of common notoriety that the human voice can be easily discerned, while as regards the ground of agency, it is very apparent that under well recognized rules governing that subject, the parties can be made to sustain the relation of principle and agent in most if not all the cases that arise. See *Oskamp v. Gadsden*, (Neb.) 17 L. R. A. 440; *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

"Courts of justice do not ignore the great improvements in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses, are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are admissible in evidence, as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be, in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight, in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it." Barclay, *J.*, in *Wolfe v. Missouri Pac. R. Co.* 3 L. R. A. 539, 97 Mo. 473, 10 Am. St. Rep. 331.

From a trenchant criticism on this case by the editor of the New York Law Journal, we extract the following: "It is evident that a clerk in an ordinary shop, in apparent charge thereof, has a somewhat different authority to speak for his employer than an unknown person speaking over a telephone. In each case it is a question of presumptive evidence, but the presumption is very much stronger in the case of the clerk in the store than of the speaker over the telephone. The question as to where is the clerk is absolutely determined; as to where is the speaker over the telephone is only a matter of very great probability. On the second point, that an identification of the voice of the speaker through

the telephone is not necessary to make his declarations admissible, we think the court went to a very great extreme, and we doubt whether this ruling should be followed."

Evidence of an alleged conversation by telephone with one of the defendants, fully identified by his voice, is not to be excluded on the ground that it is not shown that the person conversed with was in fact one of the defendants, when that fact sufficiently appears by the testimony of another of the defendants. *Davis v. Walter*, 70 Iowa, 465.

The magnitude of the interests involved, the prominence of the parties under accusation, the national reputation of those indirectly involved, the eminence of the counsel employed and the exceptional ability of the presiding judge have invested the celebrated case of *People v. Ward*, 3 N. Y. Crim. Rep. 483, with unusual interest. Among the many incidents of that trial, hotly contested, arose over the admission in evidence of an alleged conversation over the wire between the then president of the Marine Bank and the defendant Ferdinand Ward. The Hon. Benjamin F. Tracey, subsequently of the New York court of appeals strenuously opposed the reception of this evidence, and the court in the person of the distinguished *Mr. Justice* Barrett promptly overruled the objection and admitted the conversation in evidence. This ruling has excited vehement controversy and elicited a great amount of comment, wise and otherwise; but the decision itself has never been shaken; and the contention that has surged around it, has failed to impair either its logic or its justice. Refining caustics have seriously contended that a distinction should be recognized in criminal and civil cases; but such argument seems grounded in mere mawkish sentimentalism without even a granule of common sense in its support. See Rice, Civil Evidence, chap. 63, title "*Telephone*."

§ 303. **Dress as a Means of Identification.**—"This is usually one of the first circumstances observed in the appearance of a person, and, where it is in any degree peculiar, furnishes important means of identification. . . . It is the exterior clothing, however, including the hat, which ordinarily makes the first and most lasting impression upon the sense of sight. An overcoat, from its size, will soonest attract attention, and frequently is the only portion of the clothing which is distinctly visible. Hence it is constantly mentioned in testimony descriptive of the persons

of assailants and other offenders. The exterior clothing, like the size, is also frequently distinguishable by very imperfect or transient light. But, in one respect, this circumstance of dress is less reliable than other observed appearances; it being frequently assumed for the very purpose of disguise, and laid aside or destroyed after the crime has been perpetrated. The absence of an article of apparel usually worn out of doors, such as a hat, constitutes another observable circumstance by which a person may be identified." Burrill, Circ. Ev. 639.

§ 304. Perplexing Nature of this Grade of Evidence.—

Evidence of identity should be as far certain as human recollection under the most favorable circumstances will permit. The books are full of instances where inaccurate evidence as to identity has consigned unfortunate beings to the prison and the gibbet. 3 Greenl. Ev. § 30; Wills, Circ. Ev. chap. 47; *Nichols v. People*, 17 N. Y. 114; *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456.

Questions of identity are often perplexing and doubtful, as observe from the following cases :

The case of Martin Guerre, heard before the Parliament of Toulouse in 1850. In this case Arnauld Dutille, an adventurer, imposed successfully on the wife of Guerre as her husband and had children by her. Several hundred witnesses were examined and it was only the arrival of the true husband that developed the deceit. 1 Beck, Medical Jurisprudence (13th ed.) 674.

Case of Sieur De Caille, cited by same author, page 675; *Case of Salome Muller*, heard before the supreme court of Louisiana, May term, 1845. See Beck, Medical Jurisprudence (13th ed.) 683; *Case of Shepardson* (Beck, page 683); the *Lowell case*, *Lenaquez case*, and the negro case cited by Beck, pages 684, 685. See also Munsell's Cases of Personal Identity, published in Albany in 1854. *People v. Wiggins*, 1 N. Y. Crim. Rep. 290, affirmed in 92 N. Y. 656, 1 N. Y. Crim. Rep. 296.

§ 305. Cautionary Suggestions of Mr. Justice Taylor.—

"The first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind is afforded by our own senses. 'Believe half what you yourself see, and a twentieth part of what you hear from others,' is a maxim, which reflects severely upon human intelligence and veracity, but which, nevertheless, is founded in the main upon the experience of life, and marks the vast distinction that obtains be-

tween a knowledge of facts derived from actual perception, and the belief of the existence of facts resting on information. . . .

"These observations apply to all cases, in which the guilt or innocence of the prisoner depends upon the identity or comparison of two articles found in different places; as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused, or the fractured bone of a sheep with mutton found in his house, or fragments of dress with his rent garment, or damaged property with the instrument by which the damage is supposed to have been effected. In all these, and the like cases it is highly expedient, if possible, to produce to the court the articles sought to be compared; and although the law, in demanding the production of the best evidence, does not expressly require that this course should be adopted, but permits a witness to testify as to his having made the comparison, without first proving that the article cannot be produced at the trial, their non-production, when unexplained, may often generate a suspicion of unfairness, and will always furnish an occasion for serious comment." See 1 Taylor, Ev. §§ 554, 555, citing *Armory v. Delamirie*, 1 Strange, 504; 1 Smith, Lead. Cas. (8th Am. ed.) *374.

CHAPTER XL.

CONFESSIONS, CONDUCT AND Demeanor OF THE ACCUSED.

- § 306. *The Term "Confessions" Defined.*
- 307. *Confessions must be Voluntary.*
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- 309. *Presumption as to.*
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§ 306. **The Term "Confessions" Defined.**—A voluntary confession is one proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. *People v. McMahon*, 15 N. Y. 384; *People v. Chapleau*, 121 N. Y. 266.

"It is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the crime." *People v. Strong*, 30 Cal. 151. And in delivering the opinion of the court in *People v. Parton*, 49 Cal. 632, McKinstry, J., said: "A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt."

Prima facie, all confessions are voluntary, and it is for the party objecting to their admission as evidence to show that they were uttered under such pressure of hope or fear as to raise a doubt of their accuracy. It is undoubtedly the duty of the court to guard carefully the rights of a defendant in this respect; and more especially so when the prisoner is in the custody of the law and the hope or fears are supposed to be raised by an offer of the law. The fact that a defendant may think it will be better for

him if he confesses, or thinks it will be worse for him if he does not confess, is immaterial, if that condition of mind is brought about by his own independent reasoning. It is when that state of mind is induced by promises or threats or other inducement from without, that the confession is to be rejected. *Com. v. Sego*, 125 Mass. 210.

Confessions of the prisoner are receivable in evidence, upon the presumption that a person will not make an untrue statement against his own interest. 1 Phil. Ev. (9th ed.) 397.

§ 307. **Confessions must be Voluntary.**—To render confessions of a party charged with crime admissible against him, it must be clearly shown that they were free and voluntary. *Coffee v. State*, 25 Fla. 501; *Murray v. State*, 25 Fla. 528. This rule will receive further vindication as we proceed.

Sir William Blackstone in a well known passage, says: "In cases of felony, confessions are regarded as the weakest and most suspicious of all testimony; very liable to be obtained by artifice, false hopes, promises of favor, menaces; seldom remembered accurately or reported with precision, and incapable in their nature of being disproved by other negative evidence." 4 Bl. Com. 357. It is to be observed in the first place that Blackstone uses this language in connection with his criticisms upon state trials for treason in England, and, although he intends his observations to have a general application to all cases of felony, he regarded them as primarily to be considered in state trials for treason. But the annotator upon this text of Blackstone thus remarks in a note: "It seems to be now clearly established that a free and voluntary confession of a person accused of an offense whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not; in short, that any voluntary confession, made by a prisoner to any person, at any time or place, is strong evidence against him, and, if satisfactorily proved, sufficient to convict without any corroborating circumstances. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise; for, however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest, than from a sense of guilt." Citing Phil. Ev. 86. Such undoubt-

edly is the rule as enunciated by the most authoritative text-writers. *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551.

“No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if (in the opinion of the judge) such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority. The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority, if the crime of which the person making the confession is accused was not committed against him. A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary. Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.” Stephen, Dig. art. 22.

While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke in *Reg. v. Baldry*, 2 Den. C. C. 430, 445, that the rule against their admissibility has been sometimes carried too far, and its application, justice and common sense has too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. “Such a confession,” said Eyre, *C. B.*, *Rex v. Warickshall*, 1 Leach, C. C. 263, “is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt and, therefore, it is admitted as proof of the crime to which it refers.”

A confession is presumed to be voluntary unless the contrary is shown, or something appears in the confession or its attendant

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circumstances to combat such presumption. *State v. Meyers*, 99 Mo. 107; *People v. Barker*, 60 Mich. 277. And the jury are to determine for themselves whether the confession was made freely and voluntarily, without any influence of hope or fear; that if so, they could consider it, but if not, it is no evidence. This was a distinct recognition of the rule on the subject found in *Holsenbake v. State*, 45 Ga. 44; *Stallings v. State*, 47 Ga. 572; *Mitchell v. State*, 79 Ga. 730; *Bailey v. State*, 80 Ga. 359. In any circumstance, if information derived from a confession leads to a discovery of *material facts* which go to prove the commission of the crime alleged, so much of the confession as strictly relates to the facts discovered, and the facts themselves, are admissible in evidence, although the confession may not be shown to have been voluntary. *Lowe v. State*, 88 Ala. 8.

§ 308. Judge to Decide if Confession is Voluntary.—When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise it should be excluded. When there is conflicting testimony, the humane practice is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant. *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Nott*, 135 Mass. 269; *Com. v. Smith*, 119 Mass. 305; *Com. v. Preece*, 140 Mass. 276.

§ 309. Presumption as to.—In the absence of all evidence, the presumption is that a confession is voluntary; and when the party confessing objects that confessions are not voluntary, he is called upon to show at least enough to rebut such presumption. *Com. v. Culver*, 126 Mass. 464.

A confession freely and voluntarily made is evidence of the most satisfactory character. But the presumption upon which weight is given to such evidence, namely: that an innocent man will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made, either in consequence of inducements of a temporal nature held out by one in authority, touching the charge preferred, or because of a threat or promise made by or in the presence of such person, in reference to such charge. *Hopt v. Utah*, 110 U. S. 574, 28 L.

ed. 262. This must not be construed as holding that, a confession made by a defendant on the simple advice of an officer that he "had better tell the truth" is free and voluntary (*State v. Meekins*, 41 La. Ann. 543) but confessions are always admissible if no inducement was held out or threat made, or anything done to induce the accused to believe that it would be better for him to confess, and worse if he did not. *State v. Moorman*, 27 S. C. 22.

§ 310. **If Elicited by Fear or Menace should be Rejected.**—

The general principle is well settled, that the confessions of parties in civil suits or criminal prosecutions, are to be received in evidence. It is equally clear that confessions made under some circumstances are not admissible. Where they are entirely voluntary, they are to be received; but where they are drawn out by any expectation of favor or by menaces, they are to be rejected. In determining this question, it is proper to take into view the reason on which confessions so drawn out are excluded. It is not because of any breach of good faith in admitting them, nor because they are extorted illegally (though there may be cases in which this would exclude them, as where a magistrate puts the accused upon his oath) but the reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage, or fear of inquiry, to state things which are not true. *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491.

The reasoning that prevailed in the Massachusetts case last cited led the New York court of appeals to declare that an accused who has signed a confession that he committed the crime of which he is charged, in concert with others, has the right to prove, if he can, that the important parts of the confession were not entitled to any credit with the jury, especially where he was indicted jointly with some of the persons described in the confession as his confederates. *People v. Fox*, 121 N. Y. 449.

No reliance whatever can be placed upon admissions of guilt obtained by means of threats or promises; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them. The cases of *State v. Phelps*, 11 Vt. 116, 34 Am. Dec. 672; *State v. Walker*, 34 Vt. 296; *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *State v. Bostick*, 4 Harr. (Del.) 563; *State v.*

Guild, 10 N. J. L. 192, 18 Am. Dec. 404; *Spears v. State*, 2 Ohio St. 583; *Com. v. Taylor*, 5 Cush. 605; *Com. v. Tuckerman*, 10 Gray, 190; *Smith v. State*, 10 Ind. 106; *Miller v. People*, 39 Ill. 457; *Cain v. State*, 18 Tex. 387; *Davis v. State*, 2 Tex. App. 588; *Van Buren v. State*, 24 Miss. 512; *Jordan v. State*, 32 Miss. 382; *People v. Barric*, 49 Cal. 342; *State v. York*, 37 N. H. 175; *Miller v. State*, 40 Ala. 54; *Porter v. State*, 55 Ala. 95; *State v. Whitfield*, 70 N. C. 356, and *State v. Hagan*, 54 Mo. 192, may all be cited in support of the views here expressed and the list might easily be increased very considerably. *People v. Wolcott*, 51 Mich. 612.

As we have seen, if the confession is not elicited by any promise or threat and is voluntary on the part of the accused, it is admissible. *People v. Wentz*, 37 N. Y. 309. It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put to him, or that it was made under hope or promise or a benefit of a collateral nature. *Joy, Confessions*, § 13; *Rex v. Lloyd*, 6 Car. & P. 393; *State v. Tatro*, 50 Vt. 483.

A distinction should be recognized in this connection, which rejects evidence of a confession extorted during the excitement and turmoil of riot, mob violence, or other forcible means. In such cases the imminent danger of great bodily harm may prompt a person to solemn statements even under oath, the only object of which is to avoid the peril and apprehension of the moment. *Young v. State*, 68 Ala. 569; *State v. Revells*, 34 La. Ann. 381, 44 Am. Rep. 436; *Miller v. People*, 39 Ill. 457; *Jordan v. State*, 32 Miss. 382.

The theory underlying the principle in the text last cited, is of extending influence and in many jurisdictions the rule obtains that where the confession is induced by some promise of favor or threat of harm emanating from some person of official character, or believed by the accused to sustain an official relation, the confession should be excluded. *Spears v. State*, 2 Ohio St. 583; *Com. v. Tuckerman*, 10 Gray, 173; *People v. Wolcott*, 51 Mich. 612; *State v. Revells*, *supra*.

The foregoing reasoning will exclude a confession of crime, by one who was told that if he did not confess to the speaker he would have to confess to a justice of the peace. *Johnson v. State*,

76 Ga. 76. And, similarly, a confession is not admissible when made by a defendant who sought the sheriff to find out if a confession would not be better for him, and was encouraged by the sheriff to think that it would be. *People v. Thompson*, 84 Cal. 598.

When a confession has been obtained through illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown. *Coffee v. State*, 25 Fla. 501; *Murray v. State*, 25 Fla. 528.

Any, the slightest, menace, or threat, or any hope engendered or encouraged that the prisoner's case will be lightened, meliorated, or more favorably dealt with, if he will confess—either of these is enough to exclude the confession thereby superinduced. Any words spoken in the hearing of the prisoner, which may in their nature, generate such fear or hope, render it not only proper but necessary that confessions made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made, after all trace of hope or fear had been fully withdrawn or explained away, and the mind of the prisoner made as free from bias and intimidation as if no attempt had ever been made to obtain such confessions. *Owen v. State*, 78 Ala. 425.

“Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by persons in authority. It may be true, even in such cases, owing to the variety and character of the circumstances, that the promise may not in fact induce the confession. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule applicable to them all. We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to appear that they were made voluntarily.” *People v. Barrie*, 49 Cal. 345.

§ 311. **Great Caution Enjoined in Receiving.**—To be relevant and hence admissible, it must clearly appear that the confession was entirely voluntary. The reason for this rule is very well stated in *State v. Fields*, Peck (Tenn.) 140, that “the evidence of such confession is liable to countless abuses. They are made by persons, generally, under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure

will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tormented with anguish, and difficulties gathering into a multitude—how easy it is for the hearer to take one word for another, or to take a word in a sense not intended by the speaker, and, for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible it is to make a third person understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust and under apprehensions of the wrong it may do. Its admissibility is made to depend on it being free of the suspicion that it was obtained by any threats or severity or promise of favor, and of every influence, even the minutest.” *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835.

As previously stated, before the confessions of a party charged with crime are admissible in evidence against him, it must be shown that such confession was freely and voluntarily made. This widely accepted rule is sustained by numerous authorities. See *Thompson v. Com.* 20 Gratt. 724; *Simon v. State*, 5 Fla. 285; *State v. Carr*, 37 Vt. 191; *Dixon v. State*, 13 Fla. 636; *State v. Walker*, 34 Vt. 296; *Metzger v. State*, 18 Fla. 481; *Com. v. Whittemore*, 11 Gray, 201; *Flanagin v. State*, 25 Ark. 92; *Com. v. Tuckerman*, 10 Gray, 173; *State v. Staley*, 14 Minn. 105; *State v. Squires*, 48 N. H. 364; *Cady v. State*, 44 Miss. 332; *People v. Phillips*, 42 N. Y. 200; *State v. Lowhorne*, 66 N. C. 638; *State v. Howard*, 17 N. H. 171; *O'Brien v. People*, 48 Barb. 274; *Frain v. State*, 40 Ga. 529; *Vaughan v. Com.* 17 Gratt. 576; *State v. Brockman*, 46 Mo. 566; *Price v. State*, 19 Ohio, 423; *Frank v. State*, 39 Miss. 705; *Mose v. State*, 36 Ala. 211; *State v. Ostrander*, 18 Iowa, 435; *Aaron v. State*, 37 Ala. 106; *Austine v. People*, 51 Ill. 236; *Joe v. State*, 38 Ala. 422; *Miller v. People*, 39 Ill. 457; *Love v. State*, 22 Ark. 336; *People v. Jim Ti*, 32 Cal. 60.

But it is a rule of law of equally wide acceptance that the confessions of parties charged with crime should be acted upon by

courts and juries with great caution. *Deathridge v. State*, 1 Sneed, 75; *People v. Johnson*, 41 Cal. 452; *Simon v. State*, *supra*; *Dixon v. State*, 13 Fla. 636; *Metzger v. State*, 18 Fla. 481; *People v. Rulloff*, 3 Park. Crim. Rep. 438; 1 Greenl. Ev. § 200; Best, Ev. 537. The wisdom of this rule cannot be questioned, for the reason that, notwithstanding the confessions of persons accused of crime have been held to be evidence of the very highest character, upon the theory that no man would acknowledge that he had committed a grave crime unless he was actually guilty; but experience teaches that this theory is a fallacy, for it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes, for which they suffered the most horrible punishments, and yet they were innocent.

In comparatively recent times men and women confessed that they were guilty of witchcraft—and given to experiments in materialization and hypnotics—and at this day, men, through fear of personal punishment, or through hope or averting such punishment, confess that they are guilty of crime, without the slightest foundation in truth for such confession, and for these reasons, we say that the theory that men will not confess to the commission of crimes of which they are innocent is a fallacy.

There is another rule of law, and it has its foundation in justice, and that is, that when a confession has, in the first place, been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown. *Simon v. State*, 5 Fla. 285; *Love v. State*, 22 Ark. 336; Whart. Crim. Ev. 677; 2 East, P. C. 658; Best, Ev. 537; Roscoe, Crim. Ev. 40; Heard, Crim. L. 189; *Peter v. State*, 4 Smedes & M. 37; *Joe v. State*, 38 Ala. 422; *Dinah v. State*, 39 Ala. 359; *Ward v. State*, 50 Ala. 120; *Thompson v. Com.* 20 Gratt. 724; *Redd v. State*, 69 Ala. 255; *Barnes v. State*, 36 Tex. 356; *People v. Jim Ti*, 32 Cal. 60; *Deathridge v. State*, 1 Sneed, 75; *People v. Johnson*, 41 Cal. 452; *State v. Howard*, 17 N. H. 171; *Austine v. People*, 51 Ill. 236; *State v. Jones*, 54 Mo. 478; *State v. Brockman*, 46 Mo. 566; 2 Russell, Crimes, 832; 2 Stark. Ev. 49.

§ 312. **Province of Court and Jury with Reference to.**—If, by comparison, the confessions are to be in harmony and consistency with all the other evidence, they may be received as true, though believed by the jury to be involuntary. But the deter-

mination of their incredibility is exclusively their province, and the court will have invaded the province of the jury, if it instructed them to reject the confessions as wanting in credibility, if they were not made freely and voluntarily. *Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255.

§ 313. **Confessions not Conclusive.**—"The fallacy of attributing a conclusive effect to confessorial evidence was detected by the intelligence of later times, and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature—self-preservation—may be trusted as a sufficient guaranty for the truth of any such statement. This reasoning is, however, more plausible than sound. Conceding that every man will act as he deems best for his own interest, still (besides the possibility of his misconceiving facts or law) he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give way to the stronger; and consequently, that a false confessorial statement may be expected, when the party sees a motive sufficient, in his judgment, to outweigh the inconveniences which will accrue to him for making it. Now, while the punishment denounced by law against offenses is visible to all mankind, not only are the motives which induce a person to avow delinquency confined to his own breast, but those who hear the confessorial statement often know little or nothing of the confessionalist, far less of the innumerable links by which he may be bound to others who do not appear on the judicial stage. The force of these considerations will be better appreciated when we come to examine separately the principal motives to false confessions; but first, as connected with the whole subject, must be noted a marked distinction between our judicature and that of most foreign nations." Best, Ev. § 554.

§ 314. **Credibility of the Witnesses Proving may be Examined.**—The credibility of the witnesses, who may prove confessions, and of the confessions themselves, are legitimate subjects of inquiry, and may be impeached in any authorized mode.

Though the defendant may have confessed the crime, he may show that the offense with which he is charged was not in fact committed, or that he was not the guilty agent. These are the immediate issues to be tried, and any evidence is pertinent which properly tends to prove or disprove them, and to elucidate the main inquiry. Any investigation of the truth or falsity of such admissions and declarations would raise collateral inquiries, multiply the issues, and by diverting the minds of the jury from the main inquiry, confuse their deliberations. *Lang v. State*, 34 Ala. 1.

§ 315. **Confessions under Intoxication.** — Intoxication of the accused at the time when he may have made a confession would have affected the weight of the confession as evidence against himself, but would not go to exclude the confession from being put in evidence. *Com. v. Howe*, 9 Gray, 110. That degree of intoxication which leaves one capable of making a narration of past events, or stating his own participation in a crime, is not sufficient to exclude the inculpatory statement from the consideration of the jury. *State v. Grear*, 28 Minn. 426, 41 Am. Rep. 296; *Joy*, Confessions, 42; *Rex v. Derrington*, 2 Car. & P. 418; *Rex v. Thomas*, 7 Car. & P. 345; *King v. State*, 40 Ala. 314; *Gates v. People*, 14 Ill. 433; *People v. Barker*, 60 Mich. 277; *State v. Staley*, 14 Minn. 105; *State v. Jones*, 54 Mo. 478; *State v. Phelps*, 74 Mo. 128; *State v. Fredericks*, 85 Mo. 145; *State v. Rush*, 95 Mo. 199; *State v. Mitchell*, 61 N. C. 447; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835; *Com. v. Hanlon*, 3 Brewst. 461.

The infirmities that attend a confession made by one under the influence of liquor equally apply to those made by one in sleep. In both instances, the absence of knowledge as to the scope, nature and effect of the statement made, is a ground for exclusion. See *People v. Robinson*, 19 Cal. 40.

Where, however, the confession is obtained as the result of an artful intrigue, or disingenuous practices and even gross falsehood, the confession is none the less admissible, if it sufficiently appears that, while induced by these reprehensible methods, it was still voluntarily elicited, and did not originate in threats or promises operating upon the mind of the accused. *King v. State*, *Gates v. People*, *State v. Phelps*, *State v. Mitchell*, *People v. Barker*, *State v. Jones*, *State v. Rush*, *State v. Fredericks*, *Com. v. Hanlon*, *State v. Staley* and *Heldt v. State*, *supra*.

§ 316. Confession Obtained by Improper Influence.—

Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believe, from the length of time intervening, from proper warning, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. A prisoner may be convicted on his own confession, when proved by legal testimony, although it is uncorroborated by any other evidence, provided the *corpus delicti* be proved. Corroborating circumstances, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such in short, as may serve to impress a jury with a belief of its truth. *State v. Guild*, 10 N. J. L. 192, 18 Am. Dec. 404.

The rule may be expressed as follows: When one confession is denied admission because improperly obtained, a subsequent confession is equally incompetent as evidence, unless it should satisfactorily appear that such an interval of time had elapsed between the two confessions as to warrant the presumption, that the infirmities connected with the first confession had been effectually removed. In other words, if the inducements that prompted the first confession have disappeared, and there is reason to believe that they in no wise prompted the subsequent confession, it should be regarded as relevant testimony. *Porter v. State*, 55 Ala. 95; *Beery v. United States*, 2 Colo. 186; *Bonner v. State*, 55 Ala. 242; *People v. Johnson*, 41 Cal. 452; *McAdory v. State*, 62 Ala. 154; *Love v. State*, 22 Ark. 336; *Owen v. State*, 78 Ala. 425; *Simon v. State*, 5 Fla. 285; *State v. Guild*, 10 N. J. L. 192, 18 Am. Dec. 404; *State v. Chambers*, 39 Iowa, 179; *People v. Barker*, 60 Mich. 277; *People v. Robertson*, 1 Wheel. Crim. Cas. 66; *Brister v. State*, 26 Ala. 129; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *State v. Jones*, 54 Mo. 478; *People v. Jim Ti*, 32 Cal. 60; *Com. v. Taylor*, 5 Cush. 605; *State v. Soper*, 16 Me. 293; *Com. v. Cullen*, 111 Mass. 435; *State v. Lowhorne*, 66 N. C. 638; *State v. Frazier*, 6 Baxt. 539; *State v. Wintzingerode*, 9 Or. 153; *Beggarly v. State*, 8 Baxt. 520.

§ 317. New York Rule Relative to.—“A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made

upon a stipulation of the district attorney, that he shall be prosecuted therefor." N. Y. Code Crim. Proc. § 395.

All a party has said, which is relevant to the question involved in the trial, is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary, because obtained compulsorily or by improper influence. *Hendrickson v. People*, 10 N. Y. 21, 61 Am. Dec. 721.

No rule of evidence has probably been more sharply criticized upon ethical grounds than this, not so much as to the admissibility of confessions against persons accused of crime, but rather as regards the methods permitted for obtaining the information.

It must be admitted that in the use of this rule the moralist would find many instances where the end seems made to justify the means.

"Improper influence" was never eagerly sought under the old rule, and has no place among the limitations of the code. Accordingly it happens that officers of the law, skilled in eliciting information, and zealous (the critics say) to secure conviction in any event, are permitted to use every form of art and artifice short of the prohibition of the statute. Thus an officer may purposely ply the suspected person with liquor. *Jefferds v. People*, 5 Park. Crim. Rep. 522. He may resort to all manner of deception (*Jefferds v. People, supra*; *People v. Wentz*, 37 N. Y. 303) even to the length adopted in the recent Brooks murder trial at St. Louis, where the detective obtained indictment and imprisonment of himself for a feigned crime, in order to become a fellow-prisoner of the accused, for the purpose of winning his confidence. *State v. Brooks*, 92 Mo. 542; Morrill, Competency & Privilege of Witnesses, chap. 8, p. 95.

All confessions material to the issue, voluntarily made by a party, whether oral or written, and however authenticated, are admissible as evidence against him on a trial for a criminal offense. *People v. Wentz, supra*.

§ 318. **Demeanor of the Accused when under Arrest—Effect of Silence.**—The fact that a person charged with a crime is under arrest, does not render what he says or does inadmissible. *People v. Wentz*, 37 N. Y. 303; *People v. Montgomery*, 13 Abb. Pr. N. S. 209; *People v. Long*, 43 Cal. 444; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, 108 Mass. 464. What a third person says in the presence of a person charged, is admissible against

him if he remains silent. His silence must be taken as an acquiescence in its truth. *McKee v. People*, 36 N. Y. 116; *Hochrieter v. People*, 2 Abb. App. Dec. 363; Cases in N. Y. Ct. Apps., Ct. Apps. Lib. vol. 144, case 1, pp. 10, 11; *Donnelly v. State*, 26 N. J. L. 464, 601; *Rex v. Bartlett*, 7 Car. & P. 832; *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Spencer v. State*, 20 Ala. 24; *Rex v. Smithies*, 5 Car. & P. 332; *People v. McCrea*, 32 Cal. 98; *Lewis v. Blair*, 3 Irvine, 16; *Fenno v. Weston*, 31 Vt. 345; *Mattocks v. Lyman*, 16 Vt. 113; *Liles v. State*, 30 Ala. 24, 68 Am. Dec. 108; *Johnson v. State*, 17 Ala. 624; *Martin v. State*, 28 Ala. 81; *Fralich v. People*, 65 Barb. 48; *Jewett v. Banning*, 21 N. Y. 27; Phil. & Am. Ev. § 696; Joy, Confessions, 77; Best, Presumptions, § 241; Burrill, Circ. Ev. 482, 483; McDonald, Crim. L. of Scotland, 543; 2 Russell, Crimes, 866; 1 Phil. Ev. 400; 1 Taylor, Ev. (6th ed.) § 739. Statements made by the accused as a witness in exculpation of another charged with the same offense, may be proved. MacDonal, Crim. L. of Scotland, 543; *Edmondston's Case*, 1 Scotch L. R. 107; 2 Russell, Crimes, 865, 866. When there is a question of identity it is proper to show that a witness, unacquainted with a party, identified him shortly after the occurrence. *Rey. v. Blackburn*, 6 Cox, C. C. 333; *Rex v. Deering*, 5 Car. & P. 165. The voluntary declarations and admissions of one on trial for a criminal offense, that is, those not made under duress, or induced by menaces or promises, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives great effect to the action of the accused as evidence tending to prove or disprove his guilt. *Teachout v. People*, 41 N. Y. 7; *People v. Wentz*, 37 N. Y. 303; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, 108 Mass. 464. When the conduct of the accused, either before or after being charged with the offense, is given in evidence, it is for the jury to draw the proper inferences and determine whether it is consistent with innocence, or is indicative of a guilty mind, proving more or less conclusively the commissions by him of the particular offense charged. Roscoe, Crim. Ev. 18; *People v. Rathbun*, 21 Wend. 509.

Where an individual is charged with an offense, or declarations are made in his presence and hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent when

it would be proper for him to speak, it is the province of a jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the statements made by others. Still, it is a familiar elementary principle, that silence, when the accused is under no restraint and at full liberty to speak, may sometimes be regarded as a tacit admission. At all events all such matters are proper for the consideration of the jury. *Pierce v. Goldsberry*, 35 Ind. 317; *Puett v. Beard*, 86 Ind. 104.

The case of *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672, does not conflict with the general principle, but suggests important limitations in its application and in the extent of its operation. If the statement is not heard by the accused, or if being heard, he deny it, or if circumstances existed at the moment which prevented a reply or rendered a reply inexpedient or improper, the evidence certainly is of no value. *Donnelly v. State*, 26 N. J. L. 464.

A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself, unless such statement is made under circumstances which prevented a reply. *Rex v. Bartlett*, 7 Car. & P. 832; Joy, Confessions, 77; 1 Greenl. Ev. § 215; 1 Phil. & Am. Ev. 422.

In the most recent treatise on criminal law, the rule is thus stated: "Where a man, at full liberty to speak, and not in the course of a judicial inquiry, is charged with a crime, and remains silent, that is, makes no denial of the accusation by word or gesture, his silence is a circumstance which may be left to the jury." Whart. Am. Crim. L. § 696.

In civil actions the same principle prevails. What is asserted in the presence of a party to a suit, and not contradicted by him, is received on the ground that his silence is an admission of the truth of what was said. *Batturs v. Sellers*, 5 Harr. & J. 119; 2 Phil. Ev. (Cowen & Hill's Notes) 192, note, 191.

The degree of credit due to such tacit admissions is to be estimated by the jury under the circumstances of each case. 1 Greenl. Ev. § 215.

It is admitted that such evidence should always be received with great caution. In some cases it may be equivocal and of the lightest possible value, in others it may be entitled to much weight.

Its value, of necessity, must be estimated by the jury. If it be doubtful whether the jury heard or understood the proposition to which his silent assent is claimed, the jury may determine it. *State v. Perkins*, 10 N. C. 377; *Berry v. State*, 10 Ga. 511; 2 Phil. Ev. (Cowen & Hill's notes), 194, note 191.

In *Greenfield v. People*, 85 N. Y. 85, 39 Am. Rep. 636, Judge Miller says: "The acts and conduct of a party at or about the time when he is charged to have committed a crime are always received as evidence of a guilty mind, and while, in weighing such evidence, ordinary caution is required, such inferences are to be drawn from them as experience indicates is warranted. . . . And the demeanor of the prisoner at the time of his arrest, or soon after the commission of the crime, or upon being charged with the offense, is a proper subject of consideration in determining the question of guilt. Such indications, however, are by no means conclusive, and must depend greatly upon the mental characteristics of the individual."

The conduct of a person charged with crime, immediately after the commission, is always the proper subject of inquiry. If he attempts to run away, or hide and evade the officer, it is a circumstance proper to go to the jury.

As has been said, the conduct and demeanor of the prisoner at the time of his arrest, or soon after the commission of the crime, may go to the jury as evidence of a guilty mind, and, so far as the testimony was confined to a reasonable time after the discovery of the crime and his arrest, it was certainly admissible. *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *State v. Baldwin*, 36 Kan. 1.

It is an important circumstance always—the conduct of the person charged with the crime when they first hear of the offense committed; and also their conduct when the crime is first charged home upon them. Now, among the ordinary evidences of guilt, is also the conduct of the party after the deed is committed. Flight and concealment are considered very strong evidences of guilt always.

When it is in the power of the person to explain, his failure to do so is strong presumptive evidence against him. *Gordon v. People*, 33 N. Y. 501.

In closing my observations upon this subject it may be well to say that all confessions are prima facie involuntary and inadmissi-

ble. *People v. Rodriguez*, 10 Cal. 50; *People v. Ah How*, 34 Cal. 218; *People v. Gelabert*, 39 Cal. 663; *Biscoe v. State*, 67 Md. 6. Nor are confessions presumed to have been voluntarily made when the party making it is restrained of his liberty, or is in immediate apprehension of great bodily harm. *Hudson v. Com.* 2 DuV. 531; *Newman v. State*, 49 Ala. 9; *Dick v. State*, 30 Miss. 593; *Miller v. People*, 39 Ill. 457; *State v. Berry*, 21 Me. 171; *Stephen v. State*, 11 Ga. 225; *Simon v. State*, 5 Fla. 285; *Com. v. Chabcock*, 1 Mass. 144; *Whaley v. State*, 11 Ga. 123; *People v. Smith*, 15 Cal. 408; *State v. Ostrander*, 18 Iowa, 435; *Com. v. Curtis*, 97 Mass. 574; *Peter v. State*, 4 Smedes & M. 31; *State v. Peter*, 14 La. Ann. 527; *Wiley v. State*, 3 Coldw. 362.

Contradictory statements by the accused are competent evidence against him. *McMeen v. Com.* 5 Cent. Rep. 887, 114 Pa. 300.

CHAPTER XLI.

EVIDENCE AFFORDED BY ACCOMPLICES.

- § 319. *Who is an Accomplice.*
- 320. *Immunities of.*
- 321. *Testimony of Accomplice Competent to Convict.*
- 322. *Caution against the Infirmities of this Evidence.*
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- 327. *Rule as to Co-defendants who have Pleaded Guilty.*
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- 329. *Evidence of Detectives, Decoys and Spies.*

§ 319. **Who is an Accomplice.**—An accomplice is a person involved either directly or indirectly in the commission of the crime. To render him such, he must in some manner, aid, or assist, or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party by reason of the criminal transaction. *People v. Smith*, 28 Hun, 626.

§ 320. **Immunities of.**—Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly.

Where the case is not within the statute, the general rule is that if an accomplice discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed; but it is equally clear that he cannot by law plead such facts in bar of any indictment against him, nor avail himself of it, upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive

for that purpose. *Rex v. Rudd*, 1 Cowp. 332; *United States v. Ford*, 99 U. S. 594, 25 L. ed. 399.

§ 321. **Testimony of Accomplice Competent to Convict.**—In *People v. Costello*, 1 Denio, 83, *Mr. Justice* Beardsley said: “Although it has often been said by judges and elementary writers that no person should be convicted on the testimony of an accomplice unless corroborated by other evidence, still, there is no such inflexible rule of law. It is a question for the jury, who are to pass upon the credibility of an accomplice, as they must upon that of every other witness. His statements are to be received with great caution, and the court should always so advise; but, after all, if this testimony carries conviction to the minds of the jury, and they are fully convinced of its truth, they should give the same effect to such testimony as should be allowed to that of an unimpeached witness, who is in no respect implicated in the offense. Such testimony will authorize a conviction in any case. The court certainly should advise great caution on the part of the jury where the testimony depends upon the uncorroborated evidence of an accomplice; but they are not to be instructed, as matter of law, that the prisoner in such case must be acquitted. Lord Ellenborough thus expressed his views upon this question: ‘No one,’ said he, ‘can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice alone. Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is, unquestionably, sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable that if credit is given to his evidence, it requires no confirmation from another witness.’” *Rex v. Jones*, 2 Campb. 132. See *Rex v. Atwood*, 1 Leach, C. C. 464; *People v. Davis*, 21 Wend. 309; *Haskins v. People*, 16 N. Y. 344; 2 Colby, Crim. L. 214.

In criminal trials, where the testimony of accomplices has been resorted to to procure conviction, it has been customary for judges presiding at the trial to instruct juries that it was ordinarily unsafe to convict upon the unsupported and uncorroborated evidence of the accomplice. Such instructions, however, have been merely advisory. *Haskins v. People*, *supra*.

§ 322. **Caution against the Infirmities of this Evidence.**—As a matter of theory, one charged with crime may be convicted

upon the evidence of an accomplice alone. As a matter of practice, courts caution juries against reliance upon the testimony of accomplices, unless corroborated by independent evidence. *Roberts v. People*, 11 Colo. 213; Whart. Crim. Ev. § 441.

“An accomplice is an admissible witness; but, as he comes before the court under suspicious circumstances, his testimony ought to be received with great caution. As a general rule, it will be unsafe to convict upon the testimony of an accomplice alone, uncorroborated by other testimony. It ought to be corroborated in material facts connecting the prisoners, and each of them with the crime; but the degree of credit to be given to the testimony of an accomplice, and the amount of corroboration necessary to render it satisfactory, are matters to be considered and determined by the jury.” *State v. Maney*, 54 Conn. 178.

The rule of law is, that a jury may convict on the evidence of an accomplice alone, if they believe it; but it is usual for the courts to say to the jury that they should not do it, and that they should have corroboration of his testimony before they would convict. *Carroll v. Com.* 84 Pa. 107.

In *People v. Noelke*, 29 Hun, 461; 1 N. Y. Crim. Rep. 252, it was held that one purchasing a lottery ticket for the purpose of showing that the vendor was engaged in a violation of the statute was not an accomplice with the person from whom the ticket was purchased. See also *People v. Noelke*, 94 N. Y. 137; 1 N. Y. Crim. Rep. 495, 46 Am. Rep. 128, and *Com. v. Willard*, 22 Pick. 476.

In the case of *People v. Smith*, 28 Hun, 626, 1 N. Y. Crim. Rep. 72, the defendant was convicted of a violation of the excise law in selling beer in quantities of less than five gallons without a license, and all the evidence under which she was convicted was given by the person to whom the sale was made. It was objected that, under section 397 of the Code of Criminal Procedure, prohibiting a conviction upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, the prisoner could not be convicted upon the uncorroborated testimony of the witness. This objection was held to be untenable by the general term of this department, it being determined that as the excise law made only the person selling, and not the purchaser, guilty of a criminal act, the purchaser was not an accomplice within the

meaning of said section of the code. But the language of Daniels, *J.*, in the case of *People v. Smith*, disposes of this objection. The learned judge says, "The purchaser has been subjected to no criminal accountability whatsoever, and by the mere purchase he could not be a participant in the offense. That was performed wholly and exclusively by the defendant, for she, unaided by the purchaser, acted alone in making the sale. An accomplice is a person involved either directly or indirectly in the commission of the crime. To render him such, he must in some manner aid, or assist, or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party, by reason of the criminal transaction." See *Com. v. Williard*, 22 Pick. 476; *Com. v. Downing*, 4 Gray, 29; *Campbell v. Com.* 84 Pa. 187; *State v. McKean*, 36 Iowa, 343, 14 Am. Rep. 530; *St. Charles v. O'Mailey*, 18 Ill. 407; *Smith v. State*, 37 Ala. 472; *People v. Farrell*, 30 Cal. 316.

Duer, *Ch. J.*, says: "The principle deducible from the cases undoubtedly is, that an accomplice, although a competent witness against the associates and partners of his guilt is, nevertheless, only admissible from reasons of judicial necessity and policy, and in furtherance of the essential ends of public justice. And the question always addresses itself to the discretion of the court; not to their judgment as to the general competency of the witness, but to their sound legal discretion, whether, upon a full consideration of the facts and circumstances of the case, he shall be permitted to testify under an implied promise of pardon, which vests in him an equitable title thereto, if he speaks the truth." *People v. Whipple*, 9 Cow. 707.

Accomplices, whether related as principal and accessory or equally concerned in guilt, are competent witnesses for each other, except when under a joint indictment. If tried under joint indictment, whether tried together or separately, neither is competent for the other. Abbott, Trial Brief, § 375.

§ 323. **Corroborative Testimony should be Required.**—As we have seen, it is competent for the jury to convict upon the uncorroborated testimony of an accomplice, and when corroboration is deemed safe, or even necessary, the rule as to the manner and extent of the corroboration is not definitely settled. Learned judges have differed on the subject. Chief Baron Joy, in his treatise on the Evidence of Accomplices, page 98, after reviewing

the cases, says: "The only rule, therefore, which has the appearance of reason to support, is that which I have endeavored to show, has uniformly and without an exception been laid down and acted upon by the English judges, which is, that the 'confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth,' without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect, according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge." In *Rex v. Birkett*, 1 Russ. & R. 251, the twelve judges agreed that "an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story."

In *Reg. v. Farlar*, 8 Car. & P. 106, Lord Abinger, *Ch. B.*, said: "It is a practice which deserves all the reverence of law that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, the corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others." *State v. Chyo Chiagk*, 92 Mo. 395.

To sufficiently corroborate the testimony of the accomplice there should be some fact testified to entirely independent of the accomplice's evidence, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant is implicated in it. *People v. Elliott*, 5 N. Y. Crim. Rep. 204.

Corroborative evidence is any evidence which properly induces the belief that the facts testified to by the accomplice are true. *Rex v. Jones*, 31 How. St. Tr. 251, 325; Thompson, *B.*, in *Rex v. Swallow*, 31 How. St. Tr. 967, 980; Joy, *Evidence of Accomplices*, 68, 98. Such evidence must corroborate some material portion of the accomplice's testimony. *Com. v. Bosworth*, 22 Pick. 397. Material testimony is such testimony as may properly

influence the result of the trial. *Melluish v. Collier*, 15 Q. B. 878; *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420; 2 Bouvier, Law Dict. title *Materiality*; 1 Stark. Ev. (4th ed.) 822.

Whenever corroboration is required it must be as to material facts. *People v. Plath*, 100 N. Y. 593, 53 Am. Rep. 236; *People v. Courtney*, 28 Hun, 589; *People v. Williams*, 29 Hun, 520; *Ormsby v. People*, 53 N. Y. 474; *Kenyon v. People*, 26 N. Y. 207, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 645; *Armstrong v. People*, 70 N. Y. 38.

The corroborative evidence must go to prove the entire crime and not only one or more of its constituent elements; and proof of one element is no proof of another. *People v. Plath*, 100 N. Y. 590, 4 N. Y. Crim. Rep. 53. "There must be some fact deposed to independently altogether of the evidence of the accomplice, which taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it." *People v. Plath, supra*. "Such evidence as merely raises a suspicion of guilt is insufficient to satisfy the requirement of section 399; the evidence must carry conviction to the minds of the jury." *People v. Williams*, 1 N. Y. Crim. Rep. 344. "The corroboration of any witness needing support ought to be by some fact, the truth or falsehood of which goes to prove or disprove the offense charged." *Frazer v. People*, 54 Barb. 310.

The additional evidence here, if any, being purely presumptive, it is important to bear in mind the principles by which the probate force of circumstantial evidence is determined and measured. *People v. Kennedy*, 32 N. Y. 145. "All proof must begin at a fixed point. The law never admits of an inference from an inference. Two imperfect things cannot make one perfect. . . . The circumstance itself from which the inference is to be drawn, is never to be presumed, but must be substantially proved; for who can prove one doubtful thing by another?" Phillips, Theory of Presumptive Proof; Lawson, Presumptions, 569. "To take presumptions in order to swell an equivocal and ambiguous fact into an criminal fact, is an entire misapprehension of the doctrine of presumptions." *Evans v. Evans*, 1 Hagg. Consist. Rep. 105. "In determining a question of fact from circumstantial evidence, there are two general rules to be observed; First, the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all; second, the evidence must be such as to

exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence." *People v. Bennett*, 49 N. Y. 137; *People v. Stokes*, 2 N. Y. Crim. Rep. 382. "If the facts be consistent with innocence, they are no proof of guilt." *Ormsby v. People*, 53 N. Y. 475; *People v. Courtney*, 28 Hun, 593; *Frazer v. People*, 54 Barb. 309; *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391. "Conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral." *Port v. Port*, 70 Ill. 484; *Mason v. State*, 32 Ark. 239; *Carroll v. Quynn*, 13 Md. 379. "Where the facts of a case are consistent with honesty and dishonesty, a judicial tribunal will adopt the construction in favor of innocence." *Greenwood v. Lowe*, 7 La. Ann. 197. "If a fair construction of the acts and declarations of an individual do not convict him of an offense—if the facts may all be admitted as proved, and the accused be innocent, should he be held guilty? . . . He may be guilty, but he may be innocent." *United States v. The Burdett*, 34 U. S. 9 Pet. 682, 9 L. ed. 273; *Frazer v. People*, 54 Barb. 306.

§ 324. **Extent of Corroboration is for the Jury.**—The degree of evidence which shall be deemed sufficient to corroborate the testimony of the accomplice, is for the determination of the jury. The law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime so that his conviction will not rest entirely upon the evidence of the accomplice. *People v. Everhardt*, 104 N. Y. 591. Among the authorities that may be cited to sustain the averments of the text are the following: *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391; *People v. O'Neil*, 109 N. Y. 267; *State v. Maney*, 54 Conn. 178; *People v. Jaehne*, 6 N. Y. Crim. Rep. 237; *People v. Kerr*, 6 N. Y. Crim. Rep. 406; *People v. Ricker*, 7 N. Y. Crim. Rep. 22; *Berry v. People*, 1 N. Y. Crim. Rep. 57; *People v. Hooghkerk*, 96 N. Y. 149; *People v. Sherman*, 103 N. Y. 513; *People v. Ryland*, 97 N. Y. 126; *People v. Davis*, 21 Wend. 309; *People v. McCallam*, 5 N. Y. Crim. Rep. 143; *Maine v. People*, 9 Hun, 113; *People v. Sharp*, 5 N. Y. Crim. Rep. 388; *People v. Lawton*, 56 Barb. 126; *People v. Thomsen*, 3 N. Y. Crim. Rep. 562; *People v. Haynes*, 55 Barb. 450; *People v. Emerson*, 20 N.

Y. S. R. 18; *Frazer v. People*, 54 Barb. 306; *People v. Runge*, 3 N. Y. Crim. Rep. 85.

We have seen that the rule requires in order to secure a conviction, that the evidence of an accomplice should be corroborated, but this corroboration need not extend in matters of particularity to the entire story of the accomplice. It is sufficient if the substance of his story is sustained by the confirmatory matter. *Ettinger v. Com.* 98 Pa. 338. And confirmation may be found in the testimony of the wife of the accomplice. *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389.

The province of corroborative evidence is, by confirming the testimony of the accomplice in regard to matters which are not within the general knowledge but likely to be known only to those engaged in the crime, to induce the belief that he is to be generally credited in his statements. Its weight is for the jury, and there is no established rule of law which requires the judge, in a case where there is corroborative evidence of this character upon matters material to the issue, to advise the jury to acquit unless there is also corroboration of the statements connecting the defendant with the crime. *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

In *Com. v. Bosworth*, 22 Pick. 397, the court says, as to the kind of corroboration required: "It is perfectly clear that it need not extend to the whole testimony; but, it being shown that the accomplice has testified truly in some particulars, the jury may infer that he has in others. But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue." In that case the evidence, held to be competent as corroborative, confirmed the accomplice as to a fact which did not tend to connect the defendant with the crime. Since this decision, it has been usual to instruct the jury in substantial compliance with the rule stated therein, though the practice of different judges in the exercise of their discretion has varied. *Com. v. Brooks*, 9 Gray, 299; *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668; *Com. v. O'Brien*, 12 Allen, 183; *Com. v. Larrabee*, 99 Mass. 413; *Com. v. Elliot*, 110 Mass. 104; *Com. v. Snow*, 111 Mass. 411. See also *Reg. v. Stubbs*, Dears. C. C. 555, 7 Cox, C. C. 48.

The principles which underlie the theories previously stated have been repeatedly vindicated by modern adjudication, and are

so thoroughly in harmony with the most obvious principles of justice, that in many jurisdictions the rule has emerged from its chrysalis condition and assumed the more dignified proportions of a statutory law. Thus, in the well known Penal Code of California, the rule is concisely stated in the following terms:

"A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof." Desty, Penal Code of California, § 1111.

In the New York Code Criminal Procedure, § 399, a variant phraseology is employed expressive of the same intent. "A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

The rule as to corroboration of accomplices is stated by the court in *People v. Plath*, 100 N. Y. 592, 53 Am. Rep. 236, as follows: "In cases where corroboration is required, there has been some diversity of opinion in the authorities as to the particular facts which should be corroborated and the extent of the corroboration needed in order to comply with the rule; but it is now conceded to be the general rule, that it should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it. When an offense was formerly proven by accomplices, it was the usual practice of trial courts to advise an acquittal, unless such evidence was in some respects corroborated by other testimony, although at common law a conviction upon the evidence of the accomplice alone was sustainable. In those cases, the extent and degree of corroboration rested in the discretion of the trial court, and necessarily varied according to the circumstances of the case. Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case. The rule as to the corroboration of an accomplice is stated in Roscoe, Crim. Ev. 122, as follows: 'that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has

been committed, but that the prisoner is implicated in it.' Russell, Crimes, 962, says: 'that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged.'"

It is not necessary that this corroborative evidence of itself should be sufficient to show the commission of the crime, or to connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The court should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether the corroboration is sufficient. As was said in *People v. Everhardt*, 104 N. Y. 591, "the law is complied with if there is some evidence fairly tending to connect the defendant with the commission of the crime, so that the conviction will not rest entirely upon the evidence of the accomplice." *People v. Elliott*, 106 N. Y. 288.

Section 399 of the New York Code of Criminal Procedure, provides that "conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." Prior to the enactment of this section it was customary for judges to instruct jurors that they should not convict a defendant of crime upon the evidence of an accomplice unless such evidence was corroborated; and yet it was the law in this state that a defendant could be convicted upon the uncorroborated evidence of an accomplice, if the jury believed it. This section has changed that rule of law and requires that there should be simply corroborative evidence, which tends to connect the defendant with the commission of the crime. *People v. Evans*, 40 N. Y. 1; *People v. Costello*, 1 Denio, 83; *Com. v. Downing*, 4 Gray, 29; Whart. Am. Crim. L. 301; 1 Chitty, Crim. L. 904.

Before the enactment of this code, it was well established that a conviction of crime could properly be had upon the uncorroborated testimony of an accomplice. *People v. Costello*, 1 Denio, 86; *People v. Davis*, 21 Wend. 313; *Lindsay v. People*, 63 N. Y. 143. It was the general practice of trial courts to charge juries that it was unsafe to convict without confirmation of an accom-

plice as to some material fact of the case; this was not a rule of law, but rested in the sound discretion of the court, and the omission or refusal so to charge was not error. *Lindsay v. People*, *supra*.

Cases would necessarily be very rare in which there would not be some corroboration of the accomplice as to some material fact; and it was entirely safe to leave the question of the credibility of an accomplice in the hands of the jury. An examination of the statute and of the cases in which it has received judicial construction will clearly demonstrate the truth of this assertion.

In *Com. v. Bosworth*, 22 Pick. 399, Morton, J., in delivering the opinion of the court, said: "We think the rule is that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters, which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial." See also *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391; *Marler v. State*, 68 Ala. 580; *Watson v. Com.* 95 Pa. 424; *State v. Graff*, 47 Iowa, 384; *Welden v. State*, 10 Tex. App. 400; Best, Ev. § 171. We have, then, the rule that the corroboration must be by proof of some fact tending to connect the defendant with the commission of the offense, independently of the testimony of the accomplice, and the test is to throw out all other evidence and see whether the evidence introduced tended to show that the defendant was connected with the offense. *State v. Maney*, 54 Conn. 178.

The Texas supreme court held, in considering this question in *Coleman v. State*, 44 Tex. 109, that the rule of law forbidding a conviction on the testimony of an accomplice, unless corroborated by other testimony tending to connect the defendant with the offense committed, was under the statute positive and peremptory and that however much the jury might be disposed to credit the accomplice, the defendant could not be convicted legally, unless the evidence of the accomplice was confirmed in some material manner tending to show the defendant's guilt. And the learned justice said in that case, "To allow convictions to stand where the corroboration is only in immaterial matters, would be to violate both the letter and spirit of the statute, and to disregard these precautionary rules which experienced and wise jurists have

deemed it necessary to adopt in order to guard against erroneous convictions based on evidence unreliable, because coming from a corrupt source." And in the case of *State v. Thornton*, 26 Iowa, 80, the court said: "Admitting, as we do, that corroborating evidence is to be sufficient, must not merely relate to the commission of the offense or the circumstances thereof, but must be evidence of a character that shall connect the defendant with the commission of the alleged criminal act, it is the opinion of the court that evidence of this character was produced by the state." The corroborative evidence must be of some material fact and this was the rule in reference to the evidence of accomplices in this state, if corroboration were relied upon, and indeed, the general rule. What appears to be required is, that there should be some fact deposed, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. In the case of *People v. Davis*, 21 Wend. 309, the charge excepted to was that the accomplices of the prisoner were not to be believed by the jury unless confirmed by other credible witnesses in respect to the facts connecting the prisoner with the possession of the forged bills, or with the manufacture of them; but the court declared that no error had been committed, because it was not necessary by existing rules that every part of the testimony should be confirmed, the question usually being whether the jury will believe the witness in such parts of his narrative as the confirmation extends to, and quoted with approbation by the observation of *Mr. Justice Anderson* in summing up the case of *Rea v. Wilkes*, 7 Car. & P. 272, namely, that the confirmation he always advised juries to require, was the confirmation of the accomplice in some facts which went to fix the guilt on the particular person charged.

This subject has been very largely discussed. Note to Ala. Code of 1886, § 4476; 1 Am. & Eng. Enc. Law, 78; note to *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 671; *Lumpkin v. State*, 68 Ala. 56; *People v. Haynes*, 55 Barb. 450; *People v. Clough*, 73 Cal. 348. The fullest and ablest discussion of the question to which our attention has been directed is in *Com. v. Holmes*, 127 Mass. 424, 34 Am. Rep. 391. The opinion was by Gray, *Ch. J.*, now Associate Justice of the Supreme Court of the United States. Among other things, he said: "Evidence which tends to prove the guilt

of the defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice; as, for instance, evidence of the possession of stolen goods, by one indicted for stealing or receiving them." In *Ross v. State*, 74 Ala. 532, the corroboration was not of any particular fact testified to by the accomplice. The corroboration relied on was, first, the flight of the defendant, and, second, proximity and opportunity for committing the crime, it having been committed at an unreasonable hour. The trial court left it to the jury to decide whether these two facts sufficiently corroborated the testimony of the accomplice as to authorize the jury to convict upon it.

§ 325. **Cross-examination of an Accomplice.**—A trial court should permit the defense in the cross-examination of an accomplice to go into every species of questioning that can affect or impair his credit as a witness. The extent of cross-examination under such circumstances and for such a purpose, is largely within the discretion of the trial court; and unless the evidence shows that discretion to have been grossly abused, the appellate court will not reverse. *Marler v. State*, 67 Ala. 55.

It is another rule well recognized in cases where an accomplice gives evidence for the commonwealth, that the defendant may show a promise on the part of the district attorney to quash an indictment as to him. *United States v. Hinz*, 35 Fed. Rep. 272.

The act of an accomplice in testifying for the state, so as to criminate himself with others, is voluntary. He could not be compelled to do so. He testifies for the state, under a promise of favor, express or implied, on condition that he will make a full statement and confession in regard to the matter. His testimony comes in such a questionable shape, that it should, in the interest of truth and justice, be subjected to the severest scrutiny and acted on with the greatest caution. There is no case in which cross-examination is more desirable or important to test the credit of a witness, than that in which one man is seeking to save his own life or liberty, by swearing away the life or liberty of others.

But when one jointly indicted with others, turns state's evidence, and attempts to convict others by testimony which also convicts himself, the rule must be different, and he has no right to claim any privilege concerning any of the facts pertinent to the issue, nor any exemption from the broadest latitude of cross-

examination. He thereby waives all privileges against criminating himself and against disclosing communications between himself and his counsel touching the offense charged. Both client and counsel may, in such case, be compelled to disclose such communications. *Alderman v. People*, 4 Mich. 414; *Foster v. People*, 18 Mich. 266; *Hamilton v. People*, 29 Mich. 173.

The reason for maintaining such privileges ceases, when one has voluntarily exposed himself by his own testimony, to the very consequences from which it was intended by the privilege to protect him. To preserve such privilege in such case would be worse than vain, for while it could not help the witnesses, it might, by withholding the only means of contradicting and impeaching him, operate with the greatest injustice towards the party on trial. *Jones v. State*, 65 Miss. 179.

§ 326. **Rights of an Accomplice Giving Evidence for the State.**—In an application to *nolle pros.* an indictment against an accomplice who has given evidence for the commonwealth which has led to the conviction of other offenders, it is always competent in order to secure the desired immunity. From a very early period this principle has been recognized in English criminal law and the American courts have followed the precedent with rigid uniformity. Perhaps an exception was made in the case of *People v. Faulkner* (not reported) where the district attorney, owing to the pressure of public sentiment, refused to *nolle pros.* the indictment and the accomplice was consequently imprisoned. The facts disclosed were of substantially the following import. On September 20, 1890, Lester B. Faulkner and his brother James were indicted, tried, and convicted on the charge of wrecking the First National Bank of Dansville, N. Y., and were sentenced to five years' imprisonment in the Erie county penitentiary. The case was appealed and while the appeal was pending Lester Faulkner died. So far as James Faulkner was concerned the appeal amounted to nothing and he entered the penitentiary on January 26, 1891. On the trial James Faulkner was a witness against his brother, jointly indicted with him, and it was believed at the time that the conviction of Lester would have been possible without his evidence. It was expected that the prosecuting officers would make a plea for clemency in the case of James because of his testimony; but the people of Dansville demanded the punishment of both brothers and no plea was

made to the mercy of the court. Satisfactory evidence of these facts having been brought to the attention of the Attorney General of the United States, and through him to President Harrison the latter issued an unconditional pardon to the accomplice "because I am advised that the United States having used the prisoner against one jointly indicted (his brother) an equitable right to clemency under the decision of the Supreme Court is established. This right, if it can be called such, could not be enforced, but as it has become a settled rule in criminal procedure, I very reluctantly act upon it." The action of the president is under date of August 2, 1892, and illustrates the tenacity with which our criminal courts adhere to the early precedent. The custom of allowing one criminal to turn state's evidence against another is abominable, and the promise of immunity, express or implied, seems a very vicious sort of bribery, but public officials often resort to this scheme and claim that it serves the ends of justice. The claim for pardon in Faulkner's behalf, therefore, while discreditable to him seems to be good against the government which has used him.

We can find no warrant for this doctrine of exemption either in the legal principles belonging to the subject or in the adjudications—it seems wholly dependent for its effectiveness upon "a doubtful expediency."

Accomplices, although admitted as witnesses for the prosecution, are not of right entitled to a pardon, but have only an equitable right to a recommendation to the executive clemency. *United States v. Ford* ("Whiskey Cases") 99 U. S. 594, 25 L. ed. 399, and it further appears that the district attorney had no authority to make an agreement that if a person charged with an offense would testify against his accomplices, he should be exempt from prosecution. *United States v. Ford* ("Whiskey Cases") *supra*.

§ 327. Rule as to Co-defendants who have Pleaded Guilty.

—An interesting question frequently arises in a criminal prosecution, when it appears that a co-defendant or accomplice has pleaded guilty, but has not been sentenced, and the prosecution wish to call him as a witness.

It has been held that a co-defendant, who has not been tried, cannot be called as a witness for one put on trial separately. *Com. v. Marsh*, 10 Pick. 57. So it has been held, in New York,

that a party in the same indictment cannot be a witness for his co-defendant, upon his trial, until he has been acquitted or convicted. *People v. Bill*, 10 Johns. 95. But the reason does not apply to one who, by conviction of his own confession, has ceased to be a party to the issue to be tried. *Rex v. Fletcher*, 1 Strange, 633. And in a late case, where a co-defendant had pleaded guilty to a charge of house breaking, and was called as a witness, before sentence, he was admitted. *Reg. v. George*, Car. & M. 111. See also 1 Phil. & Am. Ev. 29, 70.

A recent decision, says: "After a party has been adjudged guilty or not guilty by a verdict, or has voluntarily admitted his guilt by plea, he has no longer any interest in the proceedings in court to determine the guilt or innocence of the others named in the indictment. He has ceased to be a party to the issue to be tried." *State v. Jones*, 51 Me. 125. But see *Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72.

The American courts are not agreed with regard to the question. The leading case in favor of the exclusion of a co-defendant in an indictment as a witness for one of his fellows, who has a separate trial, is that of *People v. Bill*, 10 Johns. 95. It is there said that "it appears to be a technical rule of evidence, and one well settled, that a party in the same suit or indictment cannot be a witness for his co-defendant until he has been first acquitted, or, at least, convicted." And the court further declares that whether the defendant be tried jointly or separately does not vary the rule. This doctrine, so far as it relates to defendants jointly tried, is, of course, indisputable, but its extension beyond that point I do not think is sustained by any decision which we are bound to receive as a common law guide. Lord Ellenborough, in *Rex v. Lafone*, 5 Esp. 155, rejected a co-defendant as a witness on a joint indictment for a misdemeanor, although he had let judgment go by default. But this ruling is now universally admitted to be erroneous. In truth, I think it may be said to be incontestable that the English decisions do not warrant the assertion contained in the case of *People v. Bill*, *supra*.

The case of *People v. Donnelly*, 2 Park. Crim. Rep. 182, 1 Abb. Pr. 459, is occasionally cited as an authority sustaining the proposition that a party to the same indictment cannot be examined as a witness and give evidence against a co-defendant to the same indictment. This case was expressly overruled in *Wixson*

v. *People*, 5 Park. Crim. Rep. 119, by the general term of the seventh district, and in the latter case it was shown in a careful opinion by the late *Mr. Justice* Knox, that it was only in cases where the defendants to the indictment were tried together, that one is an incompetent witness in behalf of the other. Such was the case of *Rex v. Rowland*, 1 Ryan & M. 401. In the cases of *People v. Bill*, 10 Johns. 95; *People v. Williams*, 19 Wend. 377 and *McIntyre v. People*, 9 N. Y. 38, and in those cases in other states which have been decided on the authority of *People v. Bill*, *supra*, such as *Com. v. Marsh*, 10 Pick. 57, and *Campbell v. Com.* 2 Va. Cas. 314, the witness was offered to be examined in behalf of a co-defendant. *Taylor v. People*, 12 Hun, 212.

It is said in *Lindsay v. People*, 63 N. Y. 143, that "accomplices may, in all cases, by permission of the court, be used by the government as witnesses in bringing their confederates and associates to punishment. . . . There is no practice in New York requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the state."

Accomplices when under a joint indictment are not competent witnesses for each other. But where a *nolle prosequi* has been entered against one the disqualification is removed. The reason for excluding him as a witness against his fellow does not apply after his conviction on his own confession as he has then ceased to be a party to the issue. *Com. v. Smith*, 12 Met. 238. "After a party has been adjudged guilty or not guilty by a verdict, or has voluntarily admitted his guilt by plea, he has no longer any interest in the proceedings in court to determine the guilt or innocence of the others named in the indictment.' He has ceased to be a party to the issue to be tried.'" *State v. Jones*, 51 Me. 125.

If an accomplice being fully aware of his privileges still volunteers as a witness in the case and so gives criminating testimony, he cannot subsequently refuse to answer. "He cannot be allowed to state such facts only as he pleases to state, and so withhold other facts." *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668.

This entire question relating to the evidence of an accomplice is, in many jurisdictions, regulated by statute. Thus in Massachusetts "the accomplice having offered himself as a witness, his testimony was competent for and against the other defendants, as well as himself." Mass. Stat. 1870, chap. 393, § 1, cl. 3. See also *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v.*

Robinson, 1 Gray, 555. The court might permit the commonwealth to introduce any competent evidence at any stage of the trial, even after it had once rested its case. *Com. v. Blair*, 126 Mass. 40.

§ 328. **Credibility of Accomplice is for the Jury.**—The credibility of an accomplice, in respect to all his testimony, is for the jury. They may require corroboration in respect to that part of it in which he states his own connection with the crime. Manifestly if the defense had questioned that, the evidence objected to would have been admissible for that purpose. But the credibility of such a witness is for the jury as to all that he says. Hence any fact or circumstance which tends to corroborate in a slight degree any part of his testimony is admissible. It was so held in *State v. Wolcott*, 21 Conn. 272. In that case the accomplice detailed two conversations which he had with the prisoners, or one of them, in which they related to him conversations which they had had with third parties. The third parties were admitted to testify that they in fact had such conversations, although there was nothing in either conversation in itself which tended to criminate the prisoners. The court by Church, *Ch. J.*, say they “showed a privity and connection and a conspiracy between Dickerman and the prisoners,” and that Dickerman “was their confidant, to whom they imparted their plans and their motives, as he had testified.” *State v. Maney*, 54 Conn. 178.

§ 329. **Evidence of Detectives, Decoys and Spies.**—A man who will deliberately ingratiate himself into the confidence of another, for the purpose of betraying that confidence, and, while with words of friendship from his lips, he is seeking by every means in his power to obtain an admission which can be tortured into a confession of guilt, which he may blazon to the world as a means to accomplish the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor, or of moral obligation. Hence the law looks with suspicion on the testimony of such witnesses, and the jury should be specially instructed that in weighing their testimony, greater care is to be exercised than in the case of witnesses wholly disinterested. *Prewit v. People*, 5 Neb. 377. The weight to be given to such evidence is a question for the jury, and cannot be urged against its admissibility. The confession, however, seems to have been voluntary, although made to one who deliberately and re-

peatedly deceived and made false statements to the plaintiff to obtain it. It is doubtful if anything is really gained in the administration of the law from the admission of such testimony, and the consequent encouragement of the courts of the practice. If it is answered that confessions are thus obtained which otherwise could not be had, it may be said, in reply, that the same is true of the rack and wheel, by means of which confessions were formerly forced from its victims, but which experience showed were entirely unreliable. So far as appears, the plaintiff confided in this man as a friend, and was betrayed by this professed benefactor. The testimony of such a man may be entitled to very little credence, yet it must be submitted to the jury. *Held v. State*, 20 Neb. 492, 57 Am. Rep. 835, 9 Crim. L. Mag. 248.

In April, 1885, at the Southern Hotel in the city of St. Louis, Charles Arthur Preller was murdered under circumstances of exceptional atrocity. The body was dissected, packed in a trunk, and left in the room occupied by the deceased. The murderer was apprehended in New Zealand and subsequently brought to trial. With the connivance with the state's attorney, a detective under the alias of Dingfelder secured an indictment against himself from the grand jury and procured his incarceration in the same cell with Brooks, for a period of forty-seven days, the alleged murderer of Preller. While so confined, by infamous deception, he secured from Brooks what purported to be a confession; and at the subsequent trial under objection from the defense he was allowed to give evidence of this confession. *Chief Justice Norton* on review of the case in the appellate court makes use of the following language in regard to this testimony: "While the officers whose duty it was to prosecute criminal offenses, may, in their anxiety to ferret out the circumstances concerning the death of Preller, have overstepped the bounds of propriety in the course pursued by them, which is not to be commended, but condemned, it affords no legal reason for rejecting the evidence and not letting it go to the jury, whose peculiar province it was to pass upon the credibility of the witness who detailed the confession and give to it such weight as, under the circumstances, they believed it entitled to. It was for the court to say what evidence should be received and for the jury to say what weight it should have when received.

"In Missouri the following authorities establish the proposition

that an extra-judicial confession, uncorroborated and without proof *aliunde* that the crime has been committed, will not justify a conviction. *Robinson v. State*, 12 Mo. 592; *State v. Scott*, 39 Mo. 424; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *State v. Patterson*, 73 Mo. 695;” *State v. Brooks*, 10 West. Rep. 679, 92 Mo. 542.

Many authorities of high repute hold that the confessions of a prisoner even when obtained by artifice, cunning, falsehood, and deception are admissible in evidence, especially where the purported confession is corroborated by other circumstances in evidence. The corollary of this proposition is, that the discredit of an accomplice does not attach to a detective who identifies himself with a criminal organization with a view to exposing it, and this even where it appears that he assisted in and apparently approved many of its councils and methods. *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835; *State v. Patterson*, 73 Mo. 695; *Campbell v. Com.* 84 Pa. 187; *State v. Hopkirk*, 84 Mo. 278; *Rex v. Despard*, 28 How. St. Tr. 346; *State v. Phelps*, 74 Mo. 128; *State v. McKean*, 36 Iowa, 343, 14 Am. Rep. 530; *State v. Fredericks*, 85 Mo. 145; *People v. Bolanger*, 71 Cal. 21; Wharton, Crim. Ev. 440.

The act of a detective may, perhaps, be not imputable to the defendant, as there is a want of community of motive. The one has a criminal intent, while the other is seeking the discovery and punishment of crime. *State v. Jansen*, 22 Kan. 498. Where the owner learns that his property is to be stolen, he may employ detectives and decoys to catch the thief. And we can do no better than to quote again from *Judge Brewer*, in the case above cited, as to the relation of the acts of detectives and the thief, when a crime is alleged to have been committed by the two. He says: “Where each of the overt acts going to make up the crime charged is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt, or what acts done by the party who is with him, and apparently assisting him. Counsel have cited and commented upon several cases in which detectives figured, and in which defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them, that some act essential to the crime charged was in fact done by the detective, and not by the defendant, and this act not being imputable to the defendant, the latter’s guilt was not made out. The intent and act must combine; and all the ele-

ments of the act must exist, and be imputable to the defendant." See *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360.

A policeman, by pretending to be an accomplice, may obtain access to a chamber where counterfeiting instruments are collected; but this does not prevent a conviction being rendered on his testimony. *Wills*, Circ. Ev. 117, 118. The guilty party may be induced by a trap to offer the counterfeit coin, but this does not make the offering the counterfeit coin any the less indictable. *Rex v. Holden*, Russ. & R. 154, 2 Taunt. 334. Now, does the fact that a detective attends unlawful meetings for the purpose of afterwards disclosing their secrets and becoming a witness against the wrong-doers make him an accomplice? *Reg. v. Bernard*, 1 Fost. & F. 240; *Reg. v. Mullins*, 3 Cox, C. C. 526; *Com. v. Downing*, 4 Gray, 29; *Com. v. Wood*, 11 Gray, 86; *Com. v. Cohen*, 127 Mass. 282; *Campbell v. Com.* 84 Pa. 187; *State v. McKea*, 36 Iowa, 343, 14 Am. Rep. 530; *People v. Farrell*, 30 Cal. 316; *People v. Barric*, 49 Cal. 342; *Williams v. State*, 55 Ga. 391; *Wright v. State*, 7 Tex. App. 574, 32 Am. Rep. 599.

One of the most nefarious and infamous conspiracies ever known in this country—that of the "Molly Maguires," in 1876, to coerce by assassination the coal proprietors of the Pennsylvania anthracite region—was exploded, and the chief perpetrators brought to justice by the sagacity and courage of a detective who attended the meetings of the conspirators and thus became possessed not only of their plans for the future but of their exploits in the past. The fact is, there is no crime that is committed under the influences of some sort of decoy, and to acquit in all cases where the offender is incited to the crime by some instigation of this kind would leave few cases in which there could be a conviction. If the decoy is not intentional it may act by the way of negligence; and if an intentional decoy is a ground for defense so should be a negligent decoy. But it is now well settled that contributory negligence, unless breaking the casual relation between the offender and the offense, is no defense. *Rex v. Kew*, 12 Cox, C. C. 355; *Rex v. Forbes*, 7 Car. & P. 224; *Reg. v. Parish*, 8 Car. & P. 94; *Reg. v. Beard*, 8 Car. & P. 143; *Bates v. United States*, 10 Fed. Rep. 92, note by Francis Wharton.

The fact that postoffice inspectors resorted to test or decoy letters in order to bring to justice a person suspected of using the mails for the circulation of obscene literature, does not operate to

discredit their testimony upon the trial of that person for that offense. *United States v. Slenker*, 32 Fed. Rep. 691.

There is a difference between detecting and decoying, between traps and invitations, between contrivances to expose and contrivances of participation by an owner. So if the owner delivers property to the would-be thief, this is no larceny. In like manner the decoy must not himself commit any ingredient of the act which it is necessary for the criminal to commit in order to constitute the offense; as leaving the outer door open or opening it to admit the burglar. Dillon, *J.*, observed in *United States v. Whittier*, 5 Dill. 35: "There is a class of cases in respect of larceny and robbery in which it is held that where one person procures, or originally induces the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent or against the will of the owner. . . . The reason is obvious, viz: the taking in such cases is not against the will of the owner, which is the very essence of the offense, and hence no offense, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting." Citing *Rex v. Eggington*, 2 Bos. & P. 508; *State v. Covington*, 2 Bail. L. 569; *Dodge v. Brittain*, Meigs, 84; *Alexander v. State*, 12 Tex. 540; *Rex v. McDaniel*, Fost. C. C. 121.

CHAPTER XLII.

DYING DECLARATIONS.

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§ 330. **Characteristics and Scope of.**—Upon well reasoned grounds of expediency dying declarations are admissible in criminal prosecutions, where manslaughter is the gravaman of the crime alleged. This species of evidence is obviously liable to great abuse and should be received with great caution and only when a proper introduction entitles it to be received. The witness whose testimony is cast upon the record is beyond the reach of cross-examination—all opportunity for investigating the question of malice, enmity, positive identification is lost forever, and the accused whose tenure of life is hanging in the balance, has to contend with the additional disadvantage that a just indignation aroused in the minds of the triers by the mere recital of a hideous crime. Evidence of this character is universally admitted however on the ground of necessity and in order to prevent the entire frustration of justice, to impart competency to this evidence it must clearly appear that the declarant was conscious of the imminency of death—believed himself to be beyond the probabilities of recovery, and this belief must be evident by some word or act of a conclusive and unmistakable character. This conviction in the mind of the declarant that death is surely approaching is generally presumed to supply all of the impressive

effects of a duly administered oath, as it has been argued, no man in the very article of death, will deliberately go down to his grave with a lie upon his lips, and the life of a fellow being dependent upon the last gasp that he shall utter. The plausibility of this reasoning is admitted, but it is a well authenticated fact in criminal annals that countless men have calmly met the awful solemnities of death in an attitude of utter moral indifference; through the combined medium of resentment and mendacity they are induced to distort and falsify their statements until even in cases where firm belief in the doctrine of future retribution has been clearly shown the most flagrant and atrocious falsehoods have been deliberately uttered. In determining, therefore, the degree of weight that should characterize this species of evidence consideration is due, first to the mental and physical equipment of the declarant at the time of making the statement; second to the character and capacity of the communicating medium, and here we pause to interpolate a cautionary suggestion as to the reliability of the reporters of the dying declaration. Obviously they are beyond the fear of contradiction and to divert suspicion, either from themselves or others of their kindred they are frequently impelled to a gross perversion of the truth.

Notwithstanding the admitted infirmities we have outlined, the necessities of the case must and do prevail, and in all jurisdictions dying declarations are admissible in evidence. Primarily the question of admission is one of law for the court—the presiding judge must decide whether upon all the facts elicited the prosecution has properly paved the way to its reception, but on this being fairly shown it is rarely (although sometimes) reversible error to allow the declaration in evidence. At one time the untenable position was maintained, that unless the declarant was shown to have accepted the doctrine of future punishment his declaration should be excluded. But this view no longer dominates and our courts of last resort have quite generally receded from the position. The authorities upon this subject are simply overwhelming, and in the following citations the aim has been to include only those that the best reflect the present law. *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218; *Brotherton v. People*, 75 N. Y. 159; *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740; *Oliver v. State*, 17 Ala. 587; *Campbell v. State*, 11 Ga. 353; *State v. Nash*, 7 Iowa, 347; *People v. Johnson*,

1 Park. Crim. Rep. 291; *People v. Lee*, 17 Cal. 76; *Hill v. State*, 41 Ga. 484; *Scott v. People*, 63 Ill. 508; *Watson v. State*, 63 Ind. 548; *Campbell v. State*, 38 Ark. 498; *Hurd v. People*, 25 Mich. 405; *People v. Knapp*, 26 Mich. 112; *Thompson v. State*, 11 Tex. App. 51; *People v. Ybarra*, 17 Cal. 166; *Cleveland v. Newson*, 45 Mich. 62; *Donnelly v. State*, 26 N. J. L. 463; *Kehoe v. Com.* 85 Pa. 127; *State v. Oliver*, 2 Houst. 585; *May v. State*, 55 Ala. 39; *State v. Scott*, 12 La. Ann. 274.

§ 331. **Admissible only when Death is the Subject of the Charge.**—The rule is, that such evidence is admissible only “when the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations.” *Rex v. Mead*, 2 Barn. & C. 605, and *note*; *State v. Cameron*, 2 Pinney, 495; *Miller v. State*, 25 Wis. 388; *Reg. v. Hind*, 8 Cox, C. C. 300. In the last case cited, it is said that “the reception of this kind of evidence is clearly an anomalous exception in the law of England, which ought not to be extended.” See also *The Sussex Peerage*, 11 Clark & F. 108, 112.

This kind of evidence is not regarded with favor. The remarks of Redfield, *J.*, in *State v. Howard*, 32 Vt. 380, are mere *dicta*. Physical or mental weakness consequent upon the approach of death, a desire of self-vindication, or a disposition to impute the responsibility for the wrong to another, as well as the fact the declarations are made in the absence of the accused, and often in response to leading questions and direct suggestions, and with no opportunity for cross-examination; all these considerations conspire to render such declarations a dangerous kind of evidence. The rule of evidence is of common law origin, and applied and still applies only to cases of felonious homicide at common law. *State v. Dickinson*, 41 Wis. 299. We fail to perceive any substantial reason for limiting the application of this rule to cases of homicide at common law. On prosecution of indictments for procuring an abortion, dying declarations should be admitted.

A dying declaration is not admissible except where the death of the deceased is the subject of a charge of homicide, on trial, and the circumstances of the death are the subject of the declaration. Abbott, Trial Brief, § 562, citing *People v. Davis*, 56 N. Y. 96; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Railing v. Com.* 110 Pa. 100, 32 Alb. L. J. 409, overruling *Com. v. Bruce*, 16 Phila. 510; *contra*, *Montgomery v. State*, 80

Ind. 338. And, contrary to the early views regarding the subject, it is generally considered that the recitals of the Federal Constitution which provide that the accused shall be confronted by the witnesses against him, are not infringed by the rules of evidence which admit the declarations of a person *in extremis*. *Miller v. State*, 25 Wis. 384; *Robbins v. State*, 8 Ohio St. 131.

The rules of admission are fully satisfied if it can be shown that the declarant is conscious of the fact that he was in a dying condition; and the length of time that may elapse between the declaration and actual dissolution is of no consequence as regards the admissibility of the statement made. *Com. v. Cooper*, 5 Allen, 495; *Jones v. State*, 71 Ind. 66; *Swisher v. Com.* 26 Gratt. 963.

Another well recognized rule requires that the "dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, and this rule is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly stated. As to dying declarations there can be no cross-examination. The condition of the declarant in his extremity is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be important to know. Hence all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible." *State v. Center*, 35 Vt. 378; *State v. Baldwin*, 79 Iowa, 714.

The English rule, as formulated by Sir James Stephen (Dig. art. 26) is couched in the following language: "A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant; and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made. Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular."

§ 332. **Not Competent in Cases of Abortion.**—As previously noted, dying declarations are only admissible when the cir-

cumstances of the death are the subject of the declaration and the death the subject of the charge; they are not admissible in a trial for abortion, even though death has ensued. *Railing v. Com.* 110 Pa. 100.

It is equally unquestioned that there is no grade of homicide involved in the crime commonly known as abortion. The death of the woman, when it occurs, is a necessary ingredient of the offense, and the death is in part, at least, the subject of the charge. In one sense this is true. But the question is, is it so in the real sense of the rule which controls the subject?

The above paragraph should be read in connection with the case of *Montgomery v. State*, 80 Ind. 338, and *State v. Dickinson*, 41 Wis. 299. In both those cases death resulted from an attempt to produce an abortion. It was held that the death was the subject of inquiry, and hence that it was a case for the admission of dying declarations. The dying declaration was that "the operation was performed for the purpose of producing an abortion." It was held that this declaration should have been excluded. It was said: "What the purpose of an act was is an inference from facts, and witnesses must state the facts, and not their conclusions. A witness would have been required to state what was said and done. Facts are to be stated by witnesses; inferences to be made by the jury. This rule should be applied with jealous care to dying declarations. As the accused cannot cross-examine there are no means of testing the correctness of the conclusion. It may be entirely without any foundation in fact. But we need not discuss this question, for it is well settled that dying declarations must speak to facts only, and not to mere matters of opinion." *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

The weight of authority seems to be quite decidedly against the admissibility of this grade of evidence in cases of abortion. Thus in *Rex v. Hutchinson*, 2 Barn. & C. 608, note A., the prisoner was indicted for administering savin to a woman pregnant but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The court rejected the evidence, observing that although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of the inquiry. In *Reg. v. Hind*, 8 Cox, C. C. 300, the defendant

was indicted for using instruments upon a woman with intent to produce an abortion, in consequence of which she died. It was held that her dying declarations in relation to the offense were inadmissible. The same course was followed in the state of New York in the case of *People v. Davis*, 56 N. Y. 95. It was held that the dying declaration of the woman were incompetent on the general ground that the death was not the subject of the charge. In the case of *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596, the same doctrine was held. The Chief Justice said: "This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide. *State v. Barker*, 28 Ohio St. 583; *People v. Davis*, 56 N. Y. 96. The death was not the subject of the charge, and was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation. Did the court err in rejecting the dying declaration in proof of the charge? We think not. The general rule is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. *Rex v. Mead*, 2 Barn. & C. 605; *Rex v. Lloyd*, 4 Car. & P. 233, 1 Greenl. Ev. 156."

All the text-books and a host of judicial decisions assert that the rule of admissibility is confined to cases of homicide.

The case in Indiana appears to be the only one in a court of last resort in which the declarations have been held admissible. *Railing v. Com.* 110 Pa. 100.

§ 333. Admitted on Grounds of Necessity alone.—Dying declarations constitute the only exception to the rule, that in all cases the accused shall have the opportunity to meet, face to face, and to cross-examine, adverse witnesses. Such declarations are admitted upon the single ground of necessity. The necessity rests primarily and principally upon the presumption, that in a majority of cases, there will be no equally satisfactory proof of the same fact. This presumption, and the probability of the crime going unpunished, are the chief grounds of this exception in the law of evidence. It has been well said by a learned judge, that the great reasons why dying declarations should not be received generally, as evidence, in all cases where the facts involved may thereafter come in question, seems to be, that it wants one of the most important and indispensable elements of testimony, that of

an opportunity for cross-examination by the party against whom it is offered. 1 Greenl. Ev. § 156, *note A*. See also *Nelms v. State*, 13 Smedes. & M. 500, 53 Am. Dec. 94; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

The general rule is that matters contained in a dying declaration are not competent unless they would be admissible if they came from the lips of a living witness. *Montgomery v. State*, 80 Ind. 338; *Binns v. State*, 46 Ind. 311.

In the case of *Leiber v. Com.* 9 Bush, 11, it was said: "The admission of dying declarations as evidence, being in derogation of the general rule which subjects the testimony of witnesses as ordinarily received to the two important 'tests of truth,' an oath and a cross-examination, it is obvious that such evidence should be admitted only upon the grounds of necessity and public policy, and should be restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestæ*."

In the case of *Montgomery v. State*, *supra*, the court quoted with approval the following from Mr. Starkie: "But so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it."

§ 334. **An Exception to the Rule Regarding Hearsay.**—It is well settled that dying declarations can be received only on the trial of an indictment for homicide. *Wilson v. Boerem*, 15 Johns. 287; *People v. Davis*, 56 N. Y. 95. Such evidence is received as an exception to the general rule, that hearsay evidence is not admissible only upon the principle which protects human life by punishing those who commit homicide. Such crime is often committed when none but the victim and his assailant are present, and his declarations when *in extremis*—conscious that he is about to die—are received to prevent a failure of justice. 1 Greenl. Ev. §§ 156, 225, and cases cited. Not so in a civil case. *Waldele v. New York Cent. & H. R. R. Co.* 19 Hun, 69.

It is vain to attempt to disguise the infirmities and imperfections of the human mind, and its susceptibility to false impressions, under circumstances touching the heart and exciting the sympathies; and the law has wisely, in case of dying declarations, required all the guaranties of truth the nature of the case admits of. *Starkey v. People*, 17 Ill. 20.

§ 335. **Imminency of Death must be Apparent.**—In order to render the statements of a person admissible as dying declarations, such persons need not in express words declare that he knows he is about to die, or to make use of equivalent language. *Com. v. Matthews*, 89 Ky. 287.

Dying declarations are limited in their scope to the act which causes the death, and the attendant circumstances, or *res gestæ*. It is essential to their admissibility that, at the time when they were made, the declarant should have been in actual danger of death, that he should then have a full apprehension of his danger and that death has ensued. 1 Taylor, Ev. § 718. "It is the impression of impending death and not the rapid succession of death in point of fact, which renders the testimony admissible." 1 Taylor, Ev. § 718; *Reynolds v. State*, 68 Ala. 502; *Hussey v. State*, 87 Ala. 121; *Pulliam v. State*, 88 Ala. 1; Whart. Crim. Ev. §§ 282, 284; 3 Brickell, Ala. Dig. p. 226, §§ 663, *et seq.*; Clark's Manual, §§ 538, *et seq.*

They are only admitted when it is shown that the party making them was *in extremis* at the time and when all hope of this world had passed; when every motive to falsehood is supposed to be silenced and the mind is induced by the most powerful considerations to speak the truth. "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." *Rex v. Woodcock*, 2 Leach, C. C. 500; *State v. Graves*, 18 Colo. —.

The doctrine was declared and confined with succinct completeness, in the carefully considered case of *Reg. v. Jenkins*, L. R. 1 C. C. 191. In the following quotation, the Chief Baron says: "The question is whether this declaration, as it now stands, was admissible in evidence. The result of the decisions is that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die. If we look at reported cases, and at the language of learned judges, we find that one has used the expression, 'Every hope of this world gone;' another, 'Settled, hopeless expectation of death;' another, 'Any hope of recovery, however slight, renders the evidence of such declarations inadmissible.' We, as judges, must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissi-

ble is upon the prosecution." *Peak v. State*, 50 N. J. L. 179, 10 Crim. L. Mag. 528.

§ 336. **Infirmities of this Evidence Outlined.**—The dying man is not allowed to make his statements until those about him think that he is near the end, and he sees, or thinks he sees, the shadows of death settling about him. Under such circumstances, and at such a moment, if he is a believer in personal responsibility and a future state, the mind will be centered upon and more concerned about that near future than about the things that are receding from view. And hence statements made under such circumstances, as to how the injury was received, etc., come with that infirmity that always attends inattention. Especially will this be so if those statements embody what must have been the result of a process of reasoning, as an inference, conclusion or opinion. It often happens, too, that in such an extremity the mind is not in its full vigor. The memory may have been confused and the reason blunted from physical suffering or mental anxiety. In such a condition the mind yields ready assent to what may be suggested, and the person states as a fact what is in truth a conclusion or an opinion, which would clearly appear to be erroneous, were the facts stated upon which they are based. And if facts are stated, it may be that but a part are stated, the most important being omitted. It has happened that a dying declaration made one day is contradicted by a different statement upon a subsequent day. *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276.

"I have said this much in order to show how important and necessary it is to exercise great caution in the admission of dying declarations in evidence against the accused, who has no opportunity for a cross-examination." *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218. They should not be received at all where other evidence is attainable, and when the fact of killing is virtually admitted by the line of defense adopted, it is unnecessary to prove the declarations of the deceased. *Collins v. Com.* 12 Bush, 271.

Mr. Roscoe says: "Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered, that they can not be subjected to the power of cross-examination, a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security, also, which courts of justice have in ordinary cases for enforcing truth, by the terror of punishment

and the penalties of perjury cannot exist in this case. Roscoe, Crim. Ev. 35.

In the case of *Shaw v. People*, 3 Hun, 272, it was said: "It is even more important to exclude an opinion, declared *in articulo mortis*, than in an ordinary case, where the witness may be subjected to a cross-examination, etc."

§ 337. **Accused may Show Want of Belief that Death is at Hand.**—In a criminal prosecution the accused has the right to object to the introduction of a dying declaration, on the ground that when he made it the declarant did not believe that he was about to die. In support of his objection it is competent for the accused to introduce testimony tending to show that when the declaration was made the declarant was not under the sense of an impending dissolution, but that he had hopes of recovery. *State v. Molisse*, 36 La. Ann. 920.

§ 338. **Matters of Mere Opinion are Inadmissible.**—Matters of mere opinion are inadmissible. Where the declarant merely states his opinion as to the cause of an injury, and such statement would not be received were the declarant to be sworn as a witness, it is equally inadmissible as a declaration *in articulo mortis*. In such cases the familiar rule obtains the ascendancy that the witness must testify to facts and not emit mere opinion. *Binns v. State*, 46 Ind. 311; *Wroe v. State*, 20 Ohio St. 460; *Whitley v. State*, 38 Ga. 50.

The introduction of testimony of this nature must very much be confided to the discretion of the judge, who has become familiar with all the antecedents in the conduct of the cause. *Com. v. M'Pike*, 3 Cush. 184, 50 Am. Dec. 727; *Donnelly v. State*, 26 N. J. L. 601.

One feature of this peculiar grade of evidence must be clearly outlined. The *nisi prius* courts upon which ordinarily involved, in the first instance, the trial of those cases which involve questions as to the admission of dying declarations, are frequently misled by the conflict in adjudication and the plausibility of argument into the admission of evidence that represents a conclusion or opinion of the declarant. Decisions have been found which apparently support the contention that such evidence is admissible.

Wroe v. State, 20 Ohio St. 460; *Roberts v. State*, 5 Tex. App. 141; *Payne v. State*, 61 Miss. 161; *Rex v. Scaife*, 1 Mood. & R. 551; *People v. Abbott*, 4 West Coast. Rep. 132; *State v. Nettlebush*,

20 Iowa, 257; *Brotherton v. People*, 75 N. Y. 159; Whart. Crim. Ev. § 294.

Declarations of the deceased, made when *in extremis*, which are not statements of fact which a living witness would have been permitted to testify to, but are merely expressions of belief and suspicions, are not competent evidence. *People v. Shaw*, 63 N. Y. 36.

In the case of *Rex v. Scaife*, 1 Mood. & R. 551, the declaration was: "I don't think he would have struck me if I had not provoked him." Coleridge, *J.*, hesitated, but finally admitted the declaration upon the ground that it might have an influence on the amount of punishment. There was no discussion at all as to whether or not the declaration involved a conclusion. It will be observed that the declaration did not involve the one and vital question in the case, and that it was in favor of, and not against, the prisoner. The prisoner was not endangered by the want of an opportunity to cross-examine the dying witness, because the declaration was in his favor. In speaking of this declaration, the Kentucky court of appeals, in the case of *Haney v. Com.* (Ky.) 5 Crim. L. Mag. 47, said, that it was the expression of an opinion, but was admissible because in favor of the accused. The Ohio court cites it as being the statement of a fact. It was held in the Kentucky case above, as stated in the syllabus, that "the general rule that declarations of the deceased are admissible only when they relate to facts and not to mere matters of opinion, is subject to the exception that declarations of the mere opinion of deceased are admissible when they are favorable to the accused, and explain the conduct or motives of the deceased." In speaking of such declarations in favor of the accused, the court said, amongst other things, "The admission of such declarations can do no harm. Frauds cannot be practiced under cover of the rule. And there is not so much danger of misconception or perjury as where the declarant speaks from hostile feelings, surrounded by sympathizing friends, ready to construe his words as favorable to their own views, as may reasonably be done."

Much of the foregoing discussion is embodied in the dissenting opinion of *Mr. Justice Zollars* of the Indiana supreme court of judicature in the case of *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, decided in 1885. It is seldom, indeed, that any opinion is so critical in its analysis, so exhaustive in its citation, or so

logical in its conclusions. Any discussion of this subject which omits a careful consideration of this case, must be regarded as grossly imperfect. The principal opinion was delivered by *Mr. Justice Elliott*. It is a very ingenious argument in favor of the prevailing view. But while perfectly aware that my function as a text-writer will not tolerate the least attempt to make a law, I submit the dissenting opinion of this exceedingly able court contains the statement of the better view both upon principle and authority.

§ 339. Narratives of Past Occurrences are Inadmissible.—The decision in *People v. Fong Ah Sing* (Cal.) 5 Crim. L. Mag. 64, is that it is improper to prevent narratives of previous occurrences to be given in a dying declaration. What was there said by the court: "Dying declarations are restricted to the act of killing and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, they do not come within the principle or necessity on which such declarations are received." The general rule is that matters contained in a dying declaration are not competent unless they would be admissible if they came from the lips of a living witness, was declared and approved. *Montgomery v. State*, 80 Ind. 338; *Binns v. State*, 46 Ind. 311. The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. *Sylvester v. State*, 71 Ala. 17; *State v. Johnson*, 76 Mo. 121; *Lister v. State*, 1 Tex. App. 739; *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218.

§ 340. Impeaching Character of Declarant.—The eminence of the late Dr. Wharton in the entire domain of criminal law, practice and evidence has been cordially acknowledged and by none with a deeper feeling of obligation than the present writer; but at section 773 of his well known treatise on the Law of Homicide I find the following: "It seems that evidence is admissible, on the part of the defense, to impeach the character of the deceased for truth, he standing on the same footing as a witness called into court and then examined; and in one case, where the dying declarations of the deceased were admitted to show that the defendant with intent to produce on her an abortion, had administered to her oil of tansy, which was the cause of her death, the defendant was allowed to show that the deceased was con-

sidered a woman of loose character and light reputation. So it may be shown that the declarant was insane, or was an unbeliever, or was in the constant habit of making mistakes as to the identity of others." *Nesbit v. State*, 43 Ga. 238; *Donnelly v. State*, 26 N. J. L. 496; *People v. Knapp*, 1 Edm. Sel. Cas. 177; *Carter v. People*, 2 Hill, 317; *Com. v. Cooper*, 5 Allen, 495, 81 Am. Dec. 762.

If this be established law, it seems monstrous perversion of natural justice. It is not our province to quarrel with the courts; but there is something inhuman in the theory that a person who has been foully murdered, and who in the solemnities of a dying state narrates the circumstances of the assault that must result in death should have his character for truth and veracity impeached by those who from motives of malignity or self interest have something to gain through the smearing of his reputation. After the grave has inexorably interposed a bar to all challenge or contradiction—to any attempt to show previous malice, enmity or hate for a court of justice to allow irresponsible and unfriendly criticism to frustrate the demands of justice, is an attitude of hostility toward every instinct of right and impartiality. Such a rule of evidence, if tolerated and indulged, can only result in the utter miscarriage of justice, and the entire immunity of that dangerous criminal class who have graduated from elementary crime, and through all the gradations of bestial criminality have finally reached the climacteric infamy of murder.

§ 341. **Illustrations of Extreme Rulings.**—Upon this topic we find an instructive reading from the opinion of *Chief Justice Shaw*, in *Com. v. Casey*, 11 Cush. 417, 59 Am. Dec. 150. The prosecution was for murder. The evidence was introduced for the purpose of fastening the crime upon a certain person. The victim was unable to articulate; but was asked to squeeze the hand of her interrogator if it was the defendant who made the murderous assault. The victim thereupon took her hand from under the bed-clothes, seized the hand of her questioner, and squeezed it for about half a minute. At two other times she was questioned in the same way and responded in like manner. This evidence was admitted against the objection of the defendant. Commenting upon the admissibility, his honor says:

“ We appreciate the importance of the question offered for our decision. Where a person has been injured in such a way that

his testimony cannot be had in the customary way, the usual and ordinary rules of evidence must from the necessity of the case be departed from. The point first to be established is, that the person whose dying declarations are sought to be admitted was conscious that he was near his end at the time of making them; for this is supposed to create a solemnity equivalent to an oath. If this fact be satisfactorily established, and if the declarations are made freely and voluntarily, and without coercion they may be admitted as competent evidence.

A New York court of oyer and terminer has held with doubtful propriety that dying declarations should not be ignored in any case, but on the contrary should be admitted even where there is a bare possibility of the declarant's recovery. *People v. Anderson*, 2 Wheel. Crim. Cas. 398. Mr. Wharton says such a relaxation of the rule is perilous; and though we have no right to rule out such evidence because we conjecture that the deceased may have at certain moments nourished a transient hope, yet, so far as the construction of the deceased's own utterances are concerned, it is best to take the rule without qualification, and to hold that the expression of a hope excludes. *Jackson v. Com.* 19 Gratt. 656; *State v. Moody*, 3 N. C. 31, 2 Am. Dec. 616; Whart. Hom. § 754.

The same distinguished author in a subsequent section employs the following language: "If it be shown that the declarations were uttered by the dying man, to be connected with and qualified by other statements and with them to form an entire complete narrative, and before the purposed disclosure was fully made, they had been interrupted and the narrative left unfinished; such partial declarations, it is said, would not be competent evidence. But if it appear that the deceased stated all that he desired to say, the fact that the narrative of what occurred is not complete does not render the declaration incompetent." *Vass v. Com.* 3 Leigh, 786, 24 Am. Dec. 695; *State v. Nettlebush*, 20 Iowa, 257; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; Whart. Hom. § 770.

One of the most important criminal causes ever tried in the state of New Jersey is that of *Donnelly v. State*, 26 N. J. L. 463. The opinion concurred in by the full bench was written by the distinguished *Chief Justice* Green; and affords a singularly logical presentation of this entire subject of dying declarations. The commonwealth was represented by the attorney general assisted

by Joel Parker; and among the counsel for the prisoner were Messrs. Bradley, Pennington and Scott. The case was decided in 1857 and has received the repeated indorsement of the American judiciary as embodying sound principles of law relating to the admissibility of evidence. The main object of the following extended extract from the opinion in that case, is to show the extreme anxiety of our courts in the effort to detect and punish a hideous crime to admit every species of evidence that sustains any legitimate affinities to the allegations of the indictment. In the case referred to, the court doubtless went to the extreme limit of prudence in inferring the consciousness on the part of the declarant of impending death, in order to admit the statements made in evidence against the accused. We have already adverted to the very liberal position of New York over and terminer, and the Donnelly case is even more advanced as evincing the deliberate purpose of the court to admit any grade of evidence that can assist in even a slight degree in establishing the motive, manner and perpetrator of a crime. The opinion of the Donnelly case referred to proceeds as follows :

“It is suggested, that whether the person making the declaration was or was not under a sense of impending death, was a mere question of fact, to be decided by the judge; and that, being a mere question of fact, it is not the subject-matter of a writ of error, and cannot be drawn in question in this court. The answer to the objection is, that the decision involves a mingled question of law and of fact. What constitutes a dying declaration is a question of law. Whether, therefore, the circumstances shown upon the trial evince that the statement offered is what the law denominates a dying declaration, is a question of law, and the proper subject of review upon a writ of error. In dealing with this question, the court here will give to each fact sworn to its appropriate effect, without questioning the credibility of the testimony or the truth of the facts put in evidence. Upon the mere credibility of the testimony, upon this preliminary issue, the decision of the court below must be regarded as final.

“Evidence had been offered tending to show that the deceased died from a wound inflicted with a sharp instrument on the left side of the neck or throat, six inches in depth, perforating the œsophagus, severing the jugular vein and a branch of the carotid artery, and inflicting other internal injury; that the wound in its

nature was very dangerous, and the possibility of recovery from it very doubtful; that in point of fact the deceased died from the effect of the wound soon after its infliction; that after receiving the injury, he had raised the cry of murder, and had followed the murderer through an adjoining room into the hall, bleeding very profusely; that a few steps from the door of the room, he had fallen, and had there lost a large quantity of blood; that he thence entered the room adjoining his own and had laid himself upon the bed, from which he never rose; that Mr. Smith, the first person who entered the room, found him bleeding very profusely. The wounded man threw up his hands, called the witness by name, and repeated that he had been stabbed; that he had been murdered; that his throat had been cut. The witness then stated 'I asked him who by; he said, Donnelly, your book-keeper.' This is one of the declarations objected to. Upon this evidence alone, excluding all the testimony regarding the condition of the deceased from this moment till the time of his death, was not the court below justified in admitting this statement in evidence as a dying declaration? The facts before the court were, that the deceased had received a most dangerous wound, from which recovery was very improbable, and from which in fact the injured man died within an hour. That the statement was voluntarily made, immediately after the injury, to the first person that he spoke to while lying upon his bed weakened by loss of blood; that in fact he was at the moment bleeding to death. Was not that statement made under a sense of impending death? Is there any evidence to warrant the belief, that at that time or at any time afterwards, he had the least expectation or hope of recovery. *It is not necessary that the party injured should state, at the time of making the declarations, that they were made under a sense of impending death. It is enough, if it satisfactorily appears in any mode, that they were made under that sanction. It may be directly proved by the express language of the declarant, but it may also be inferred from his evident danger, or the opinion of his attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind at the time of making the declarations.* 1 Greenl. Ev. § 158; 1 East, P. C. 358; *Rex v. Woodcock*, 1 Leach, C. C. 500; *Hill v. Com.* 2 Gratt. 594; *State v. Freeman*, 1 Speer, L. 57.

"Declarations made by the injured party immediately after receiving the injury have in some cases been received as competent evidence, though not as dying declarations. *Rea v. Foster*, 6 Car. & P. 325; *Com. v. M'Pike*, 3 Cush. 181, 50 Am. Dec. 727. In the latter case it was held that the declaration of a person who is wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is admissible in evidence after her death as a part of the *res gestæ*."

It has long been a familiar axiom of the schools—"That is certain which can be rendered certain;" and whenever the evidence discloses the presence of a certain apprehension of immediate death in the mind of the declarant, although there is no express avowal of that apprehension or belief the declaration should be admitted. A surgeon of great experience and of iron nerve and fortitude is fatally wounded,—the merest inspection of his injury reveals the impending result. In the nature of the case this result is as clear to the apprehension of the wounded man as to any of his attendants, and to deny his dying declaration the status of legal evidence merely because he has failed to disclose his belief in approaching death is a rank prostitution of practical methods in the prosecution of crime. The circumstances of each particular case may be relied upon to furnish a just inference as to whether the victim was conscious of the imminency of death. *Anthony v. State*, Meigs, 265, 33 Am. Dec. 143; *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93. See Essay of Clark Bell before the Medico-Legal Society of New York, 1893.

CHAPTER XLIII.

CIRCUMSTANTIAL EVIDENCE.

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§ 342. **Term Defined.**—Circumstantial evidence consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious if the circumstances from which we seek to deduce the conclusion depends upon conjecture. *People v. Kennedy*, 32 N. Y. 141; *Jenkins v. State*, 62 Wis. 63; 1 Bishop, Crim. Proc. § 1069. In all of its correlations and affinities it is essentially the legal manifestation of the inductive process, and in its best adaptations to the requirements of either a criminal or a civil case, induction inspires its best efforts and suggests its best conclusions. This induction of which we speak, has been defined as, "that operation of the mind, by which we infer that what we know to be true in a particular case or cases, will be true in all cases which resemble the former in certain assignable respects. In other words, induction is the process by which we conclude that what is true of certain individuals of a class is true of the whole class, or that what

is true at certain times will be true in similar circumstances at all times. This definition excludes from the meaning of the term induction, various logical operations, to which it is not usual to apply that name. Induction, as above defined, is a process of inference; it proceeds from the known to the unknown; and any operation involving no inference, any process in which what seems the conclusion is no wider than the premises from which it is drawn, does not fall within the meaning of the term." Mills, *Logic, Ratiocinative & Inductive* (8th ed.) 210.

Evidence is defined to be circumstantial where the main fact is deduced from a series of collateral facts by a process of reasoning. Best, *Presumptions*, 12, 246; 1 Greenl. Ev. § 13; 3 Bl. Com. 371; 1 Phil. Ev. 598.

This grade of evidence is frequently used to prove an offense, in the absence of positive evidence of it, and it may be satisfactory, and even stronger than positive evidence. It is also often used when there is direct and positive evidence of the commission of a crime and the guilt of the defendant, in order to make a stronger case against him. And it is quite common to prove certain ingredients of the crime by the one, and other ingredients by the other kind of evidence. Thus "in larceny, for instance, after proving that the goods were taken or stolen, proof that they were found in the possession of the prisoner shortly afterwards, and that he did not give any satisfactory account of the manner in which he came by them, is deemed good presumptive evidence of the prisoner having stolen them; and if to this be added evidence that the goods when found, were concealed or disguised, or the prisoner when charged with the offense, absconded, it will very much strengthen the presumption." Archb. Crim. Pr. & Pl. 135.

It usually consists of various independent circumstances which, connected together, may show that a crime has been committed, and that the defendant is guilty. Each circumstance may be sustained by independent proof, or the testimony of different parties and the value of the evidence may largely depend upon the sufficiency of the proof of a single fact, constituting a link in the whole chain of evidence. Sometimes, however, each necessary link in the chain may be sustained by corroborative facts and testimony; and the value of the whole may depend upon the amount and value of the testimony, to independent facts. *McCann v. State*, 13 Smedes & M. 471. See also *Mason v. State*, 42 Ala.

532; *Williams v. State*, 41 Tex. 209; *Barnes v. State*, 41 Tex. 342; *Riggs v. State*, 6 Coldw. 517; *Clark v. People*, 5 Thomp. & C. 33, 2 Hun, 520; *Woodford v. People*, 5 Thomp. & C. 589; *People v. Myers*, 2 Hun, 6.

Circumstantial evidence is proof of a series of other facts than the fact in issue, which by experience have been found so associated with that fact that, in the relation of cause and effect, they lead to a certain and satisfactory conclusion; as when footprints are discovered after a recent snow, it is certain some animated being passed over the snow since it fell; and from the form and number of the footprints, it can be determined with equal certainty whether they are those of a man, bird or quadruped. Such evidence is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the facts sought to be proved. *Com. v. Webster*, 5 Cush. 310, 312, 52 Am. Dec. 711. See also *People v. Cronin*, 34 Cal. 202, 203; *People v. Morrow*, 60 Cal. 144.

Presumptive or circumstantial evidence is admissible both in civil and criminal cases, and in prosecutions for some of the worst species of crimes, is often the most satisfactory and convincing that can be produced. Walworth, *Chancellor*, in *People v. Videto*, 1 Park. Crim. Rep. 603. In the abstract, it is nearly, if not quite as strong as positive evidence; in the concrete, it may be much stronger. *Com. v. Harman*, 4 Pa. 271-273.

§ 343. **Test of Sufficiency.**—The criterion of sufficiency is this, does the circumstantial evidence resorted to, establish in the minds of the jury a sense of conviction, to the exclusion of all reasonable doubt? The convincing effect that would follow from positive testimony, is not expected to flow from circumstantial evidence. *Banks v. State*, 72 Ala. 522; *State v. Goldsborough*, 1 Houst. Crim. Rep. 302; *Jackson v. State*, 9 Tex. App. 114; *Faulk v. State*, 52 Ala. 415; *State v. Norwood*, 74 N. C. 247; *Rea v. State*, 8 Lea, 356; *Dean v. Com.* 32 Gratt. 912; *Walbridge v. State*, 13 Neb. 236.

§ 344. **Theory of the "Connected Chain" Examined.**—The philosophy of circumstantial evidence is this: That it consists in proving the many independent circumstances by different witnesses; but which, if they are proved, and if they form one consistent and connected chain in a transaction, they are apt to convince the mind; while, if they are not true, error and falsehood

are likely to be detected, so that no person shall be injured thereby. There are certain humane rules laid down in the law in relation to circumstantial evidence. In the first place, if there is a single circumstance proved which is one of the necessary links in the chain of the transaction that is inconsistent with the guilt of the accused, no matter how suspicious the other circumstances may be, he is entitled to an acquittal.

Another rule is, that in order to find a verdict of guilty the circumstances all taken together, as you shall find them proved, shall sustain no other reasonable hypothesis than that of the guilt of the accused in order to find a verdict of guilty.

In a case of circumstantial evidence, the jury have not only to determine whether the witnesses testified truthfully to the circumstances, but also to draw a natural and reasonable inference from the circumstances they find to be proved.

It is always an exceedingly satisfactory circumstance of corroboration in a criminal case, when in connection with other convincing proofs, an adequate motive for the crime or act can be assigned. It is a general axiom of human action, that all persons act from motive, and it is always a satisfactory circumstance if a jury can feel that it is proved to their satisfaction that the party had a motive, a strong, impelling motive, for the act which he is charged with doing. But it is not essential to a conviction that a motive should be proved. It is utterly impossible to see the operations of the human mind; the characters and instincts and intents of persons differ, so that what might be an adequate motive for another, for a certain act, and hence it is that it is not absolutely necessary that there shall be a motive proved in order to insure a conviction, but the absence of any probable motive is a circumstance always to be considered by a jury in favor of the accused. Pratt, *J.*, in *People v. Rubenstein*, Kings County Oyer & Terminer (not reported).

"It is a rule that may be called a golden rule in the examination and application of this kind of evidence which we call circumstantial, that should it so turn out that every fact and circumstance alleged and proved to exist is consistent on the one hand with the hypothesis of guilt, and on the other hand consistent, reasonably and fairly, with the hypothesis of innocence, then those circumstances prove nothing at all. Unless they go so far as to establish a necessary conclusion of this guilt which they offered with a view

to establish, they are utterly worthless and ineffectual for the investigation of the truth. It is not enough that the circumstances relied upon are plainly and certainly proved. It is not enough to show that they are consistent with the hypothesis of guilt. They must also render the hypothesis of innocence inadmissible and impossible, unreasonable and absurd, or they have proved nothing at all." Rufus Choate in *Dalton Divorce Case* before the Supreme Judicial Court of Mass. May, 1856.

§ 345. **Direct and Circumstantial Evidence Contrasted.**—

Direct and circumstantial evidence so closely hinge upon each other that it is often vexatious to attempt to discriminate between them. Circumstances are always looked to, to support or contradict direct evidence, and direct evidence is absolutely necessary to prove the facts upon which the inference in circumstantial evidence is based. One sustains and supports the other. Where, then, is the line to be drawn by which one is to be used and the other withheld? "Or how can any definite rule be laid down by which one is to be deemed more satisfactory than the other? With the facts clearly proved, beyond a doubt, in either case, if a logical process of reasoning is adopted, and a sound judgment exercised, the result must be the same in both. The danger of circumstantial evidence lies, first, in the liability of the senses to err where any facts are sought to be established, instead of one, as in direct evidence; and, second, in the danger of intended falsity where many witnesses are sworn to several facts instead of one to the main issue; and, third, in the danger of incorrect inferences and illogical conclusions from jurors not accustomed to close habits of reasoning, where the processes of inference and deduction are exercised, either upon several circumstances, or even a single one, remote from the main fact sought to be established. 2 Colby, Crim. L. 175.

As was said by *Chief Justice* Gibson in the case of *Com. v. Harman*, 4 Pa. 269: "The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts, by which, if true, the question of guilt or innocence is solved. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man

is necessarily imperfect, but you are not, therefore, to stop its wheels. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief,—that is, actual disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear.” This quotation from the opinion of *Chief Justice* Gibson was approvingly referred to by *Mr. Justice* Butler in his charge to the jury in the celebrated case of *Udderzook v. Com.* 76 Pa. 340.

§ 346. What must be Proved to Warrant a Conviction by.—We say of a fact or statement, that it is proved, when we believe its truth by reason of some other fact or statement from which it is said to follow. Most of the propositions, whether affirmative or negative, universal, particular, or singular, which we believe, are not believed on their own evidence, but on the ground of something previously assented to, from which they are said to be inferred. To infer a proposition from a previous proposition or propositions; to give credence to it, or claim credence for it, as a conclusion from something else; is to reason, in the most extensive sense of the term. There is a narrower sense, in which the name reasoning is confined to the form of inference which is termed ratiocination, and of which the syllogism is the general type. The reasons for not conforming to this restricted use of the term were stated in an earlier stage of our inquiry, and additional motives will be suggested by the considerations on which we are now about to enter.

In proceeding to take into consideration the cases in which inferences can legitimately be drawn, we shall first mention some cases in which the inference is apparent, not real; and which require notice chiefly that they may not be confounded with cases of inference properly so called. This occurs when the proposition ostensibly inferred from another, appears on analysis to be merely a repetition of the same, or part of the same, assertion, which was contained in the first. All the cases mentioned in books of logic as examples of equipollency or equivalence of propositions, are of this nature. Mills, *Logic, Ratiocinative & Inductive* (8th ed.) 122. See also DeMorgan, *Formal Logic of the Calculus of Inference Necessary and Probable*.

"In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt." *Scott v. State*, 19 Tex. App. 325; *Lehman v. State*, 18 Tex. App. 174, 51 Am. Rep. 298. "Every circumstance material in a case must be proven beyond a rational doubt, or it is the duty of the jury to acquit." *Sumner v. State*, 5 Blackf. 579. And "each essential independent fact in the chain or series of facts relied upon to establish the main fact, must be established to a moral certainty or beyond a reasonable doubt." *People v. Phipps*, 39 Cal. 326.

"When the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit." *People v. Anthony*, 56 Cal. 397.

"Every fact in a chain of facts, from which the defendant's guilt is to be inferred, must be proven by the same weight, degree and force of evidence as if it were the main fact of the defendant's guilt itself." *Johnson v. State*, 18 Tex. App. 385.

"The evidentiary facts must all be proved, and the existence of none of them can be presumed." *Burrill*, Circ. Ev. 733.

"The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence as if each was itself the main fact in issue." *Com. v. Webster*, 5 Cush. 295, 317, 52 Am. Dec. 711.

"The facts alleged as the basis of any legal inference, must be clearly proved and undubitably connected with the *factum probandum*." *Wills*, Circ. Ev. 173.

It is necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind is apt to take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete. *Wills*, Circ. Ev. 173.

In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely inconsistent with innocence, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and, further, when a conviction is sought upon circumstantial evidence alone, the state must show by a preponderance of evidence that the alleged facts and circumstances are absolutely incompatible with any reasonable hypothesis other than the guilt of the accused. *State v. Holden*, 42 Minn. 350.

§ 347. **Instructions from the Court Regarding this Grade of Evidence.**—In the case of *Clare v. People*, 9 Colo. 123, the evidence was wholly circumstantial. The trial judge instructed the jury as follows:

“That the rule requiring the jury to be satisfied of the defendant’s guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant’s guilt; it is sufficient if the jury are satisfied beyond a reasonable doubt that the defendant is guilty.”

Judge Helm, in reversing the trial court, said:

“The metaphor used is inaccurate, and liable to misconstruction. It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to the different circumstances as the links constituting such chain; for a chain cannot be stronger than its weakest link, and if one link fails the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to a conviction in criminal cases; since if one be omitted or be not proven beyond a reasonable doubt, an acquittal must follow. . . .

“The word ‘circumstance’ and the word ‘fact’ are frequently used interchangeably. . . . In cases where the conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may very appropriately be called circumstances; and such matters, whether spoken of as circumstances or as facts, must be established by the state beyond a reasonable doubt. . . . We deem it quite as reasonable to suppose that the jury misunderstood and misapplied the language used as that they comprehended its appropriate meaning and application. For this reason the judgment must be reversed. . . .

To prevent reversal for error in the charge, it must appear that the prisoner could not have been prejudiced thereby."

The same instruction is considered at length in *People v. Aikin*, 66 Mich. 481, and its fallacy is exposed; the court concluding its argument by saying:

"Each necessary link, each and every material and necessary fact upon which a conviction depends, must be proven beyond a reasonable doubt.

"The party upon whom the burden rests, is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance." Stark. Ev. (9th Am. ed.) § 586.

We will add that the instructions delivered in *Clare v. People*, 9 Colo. 123, were again the subject of judicial condemnation in the celebrated *Graves* case, where the conviction by the district court was reversed on appeal for error in the admission and rejection of evidence, as well as for error in the judge's charge. This case has attracted great attention—was vigorously prosecuted and ably defended and will be found reported under the title of *People v. Graves*, 18 Colo. —. The decision was handed down in February, 1893.

§ 348. **Great Latitude Allowed in the Reception of.**—Great latitude is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. Stark. Ev. 81.

The greatest scope may be indulged in matters of circumstantial evidence. *Washington v. State*, 8 Tex. App. 377. And any evidence may be resorted to which tends to develop a fact, which, if shown, would enhance the prospects of conviction or acquittal. *Simms v. State*, 10 Tex. App. 131; *Preston v. State*, 8 Tex. App. 30.

§ 349. **Views of Eminent Text-writers.**—Burrill says: "Supposing that, by a course of examination, combination and inference, the jury have reached the point of forming an affirmative belief of the probability, and strong probability, of the hypothesis of guilt, their task is not yet completed. A great and final test of the accuracy of the conclusion they are thus led to form remains to be applied, in which the entire and peculiar efficacy

of circumstantial evidence is said to consist; its application constituting the second stage in the general process of presumption. This test is the negative point of view. It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypothesis sought to be established; but they must exclude, to a moral certainty, every other hypothesis but that single one." Burrill, Circ. Ev. 181.

In another work of merit, the same line of thought is pursued, thus: "The hypothesis of delinquency should be consistent with all the facts proved. The chief danger to be avoided when dealing with presumptive evidence arises from a proneness natural to man, to jump to conclusions from certain facts, without duly advertg to others which are inconsistent with the hypothesis which those facts seem to indicate. . . . It should never be forgotten, as observed by an able writer on the law of evidence, that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist; an inevitable consequence of which is that, if any of the circumstances established in evidence, is absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true." 2 Best, Ev. (Morgan's Notes) § 451.

This familiar principle of evidentiary law is frequently enunciated in criminal reports. *People v. Cunningham*, 6 Park. Crim. Rep. 398; *People v. Strong*, 30 Cal. 151; *Harrison v. State*, 6 Tex. App. 42; *State v. Moxley*, 102 Mo. 374.

"Where there is nothing but the evidence of circumstances to guide you," said *Mr. Justice* Bailey, "those circumstances ought to be closely and necessarily connected, and to be made as clear as if there were absolute and positive proof." *Rex v. Downing*, Salop Summer Assizes, 1822. Every circumstance, therefore, which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support, must be rejected from the judicial balance; in other words, it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation. See Mittermaier, chap. 55, 57; Wills, Circ. Ev. chap. 6, pp. 173, 174.

§ 350. **Review of the Celebrated Webster Case—the Harris Case.**—Few criminal cases have been decided in this country

that have given a wider scope to evidentiary rules or have called for a more extended application of the many principles they embody, than that of the celebrated Webster case decided by the Massachusetts supreme judicial court in March, 1850. *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. The high social distinction enjoyed by the prisoner, his scientific attainments and his close relations with the greatest university of our land threw around the trial of that case an interest that but rarely attaches to a criminal prosecution. The distinguished chief justice who presided has left behind him a monumental record of rare legal accomplishments coupled with great logical acuteness, rigid impartiality and keen and unrelenting perceptions of what circumstantial evidence should disclose in order to meet the exactions of a capital case. These considerations taken in connection with the eminence of the counsel appearing for both the commonwealth and for the prisoner, must ever invest this celebrated case with intense interest and lasting value. The following quotations of the opinions of *Chief Justice Shaw* bear their own commentary and vindication. Much has been written since this opinion has been handed down pertaining to this subject; but the entire range of judicial discussion or theoretical review has failed to disclose a more apt or convincing statement of the rules pertaining to this particular grade of evidence than are found within the paragraphs of that singularly exhaustive and scholarly opinion. The most efficient and instructive application of the rules of circumstantial evidence were demanded by that celebrated case and every exaction was fully met.

“The distinction between direct and circumstantial evidence is this. Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it; is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character, as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act, in relation to their most

important concerns. It would be injurious to the best interests of society, if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

"The necessity, therefore, of resorting to circumstantial evidence if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is therefore necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, leading to inferences and conclusions as strong as those arising from direct testimony.

"On this subject, I will once more ask attention to a remark in East's Pleas of the Crown, chap. 5, § 11: 'Perhaps,' he says, 'strong circumstantial evidence, in cases of crime like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.'

"Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood.

"But, in a case of circumstantial evidence where no witness can testify directly to the fact to be proved, it is arrived at by a series

of other facts, which by experience have been found so associated with the fact in question, that in the relation of cause and effect, they lead to a satisfactory and certain conclusion; as when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell; and, from the form and number of the footprints, it can be determined with equal certainty, whether they are those of a man, a bird, or a quadruped. Circumstantial evidence, therefore, is founded on experience and observed facts and coincidences, establishing a connection between the known and proved facts and the fact sought to be proved. The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances it less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be lead by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.

“From this view, it is manifest, that great care and caution ought to be used in drawing inferences from proved facts. It must be a fair and natural, and not a forced or artificial conclusion; as when a house is found to have been plundered, and there are indications of force and violence upon the windows and shutters, the inference is that the house was broken open, and that the persons who broke open the house plundered the property.” *Com. v. Webster*, 59 Cush. 295, 52 Am. Dec. 711.

Mr. Justice Grey of the New York court of appeals in a very recent case that has attracted wide attention says :

“All evidence is, in a strict sense, more or less circumstantial, whether consisting in facts which permit the inference of guilt, or whether given by the eye-witnesses of the occurrence; for the testimony of eye-witnesses is, of course, based upon circumstances more or less distinctly and directly observed. But, of course, there is a difference between evidence consisting in facts of a peculiar nature and hence giving rise to presumptions, and evidence which is direct, as consisting in the positive testimony of eye-witnesses; and the difference is material according to the degree of exactness and relevancy, the weight of the circumstances and the

credibility of witnesses. The mind may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet, in the facts brought out, when taken together, all point in the one direction of guilt, and to the exclusion of any other hypothesis, there is no substantial reason for that reluctance. Purely circumstantial evidence may be often more satisfactory, and a safer form of evidence, for it must rest upon facts which, to prove the truth of the charge made, must collectively tend to establish the guilt of the accused. . . . A fact has the sense of, and is equivalent to, a truth, or that which is real. It is in the ingenious combination of facts that they may be made to deceive, or to express what is not the truth. In the evidence of eye-witnesses to prove the facts of an occurrence we are not guaranteed against mistake and falsehood, or the extortion of truth by exaggeration or prejudice, but when we are dealing with a number of established facts, if, upon arranging, examining, and weighing them in our mind, we reach only the conclusion of guilt, the judgment rests upon pillars as substantial and sound as though resting upon the testimony of eye-witnesses. The necessity of a resort to circumstantial evidence in criminal cases is apparent in the nature of things, for a criminal act is sought to be performed in secrecy, and an intended wrongdoer usually chooses his time, and an occasion when most favorable to concealment, and sedulously schemes to render detection impossible. All that we should require of circumstantial evidence is that there shall be positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts." *People v. Harris* (N. Y.) Jan. 17, 1893.

§ 351. **The Maybrick Case Considered.**—The necessity of reviewing all criminal cases, especially those dependent upon circumstantial evidence, and of correcting such errors as may have determined the verdict or in fact presided throughout the entire trial, has received ample vindication in a recent English case presided over by Sir James Stephen. It has since been abundantly established that the celebrated baronet was relapsing into the early stages of senility and decay, but the appalling result can be only discerned by a reference to the facts elicited on the trial.

Florence Maybrick is an American woman who was tried in Liverpool, England, in August, 1889, for the murder of her husband. August 27th she was found guilty and sentenced to be

hanged. The trial caused great public excitement. When the verdict was announced there were violent manifestations of disapproval in the court room, and a storm of protest throughout all England followed. The charge against Mrs. Maybrick was that she had killed her husband by giving him arsenic, but the evidence was weak, flimsy and contradictory, while the charge of the presiding judge to the jury was grossly unfair. Because of his behavior on this occasion and at subsequent trials, *Justice Stephen* has been pronounced insane and imbecile, and he has since resigned from the bench. There was a deep conviction in the popular mind that gross injustice had been done, and floods of petitions, demands and protests poured into the home office. The secretary felt compelled by the agitation to take the case under advisement, and after fourteen days of close investigation came to the conclusion that "there was a reasonable doubt whether in fact James Maybrick's death was caused by poison." Mrs. Maybrick's sentence was thereupon commuted to penal servitude for life, and for over three years she has been confined in Woking prison.

Thus there is presented the singular spectacle of a woman undergoing punishment for a crime of which, in the opinion of the home secretary, there is a reasonable doubt of her guilt.

The outrageous deportment of *Mr. Justice Stephen* during the trial of this case, is thus commented upon by Mr. Edward Stead :

"He laid himself out to excite prejudice against this 'horrible woman,' but even when he had finished his twelve hour harangue for the prosecution from the bench, he had sufficient judicial acumen left amidst preceptible decay of his faculties to doubt the possibility of a verdict of guilty. I was assured in Liverpool by one who had it direct from the official concerned, that when the jury retired the judge called up the clerk and asked him what the verdict would be. 'My lord,' he replied, 'I am not the jury.' 'Oh,' said the judge, 'it is impossible for them to find her guilty in face of the medical evidence.' That was also the opinion of the prosecution."

He also states that under the English criminal law "no appeal is allowed from an unjust verdict or sentence, not even in a case of life and death; while in a civil action, where only a bale of cotton is at stake it is possible to appeal from court to court, even to the House of Lords. Thus Mrs. Maybrick's only hope is in the pardoning power, and the plan is to invoke this power by agitation."

§ 352. **The Stokes Case Considered.**—If all the circumstances shown are consistent with innocence, then there can be no conviction. If they are not, then the question is whether they point to guilt so clearly and distinctly as to satisfy the mind beyond a reasonable doubt. The facts proved must all be consistent with and point to the defendant's guilt not only, but they must be inconsistent with his innocence. Church, *Ch. J.*, in *People v. Bennett*, 49 N. Y. 144. If equally susceptible of two interpretations, one innocent and one not, the innocent one must be taken. *Pollock v. Pollock*, 71 N. Y. 137; *Shultz v. Hoagland*, 85 N. Y. 464. So it is said that if it be shown that either the defendant or a third person committed the deed, but it cannot be distinctly ascertained which one, the defendant cannot be convicted. 1 Bishop, *Crim. Proc.* (3d ed.) § 1106. The same author, section 1079, lays it down as established by many adjudications that the test of the sufficiency of circumstantial evidence is that the facts proved can be reasonably accounted for on no hypothesis which excluded the defendant's guilt, that with the theory of his guilt they are harmonious and consistent, and that they point to it so clearly and distinctly as to satisfy the jury of it beyond a reasonable doubt. *People v. Stokes*, 2 N. Y. *Crim. Rep.* 382.

§ 353. **Views of the Texas Supreme Court.**—The Texas supreme court has held, that to justify conviction upon circumstantial evidence alone, the facts relied on must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. *Barnes v. State*, 41 Tex. 342; *Black v. State*, 1 Tex. App. 391.

In the case of *Burrell v. State*, 18 Tex. 713, the judgment was reversed as to the appellant, Burns, because the only evidence tending to criminate him was wholly circumstantial, and the court failed to instruct the jury upon its effect. They were instructed that "circumstantial testimony must tend closely to prove the fact, or it is not, of itself, sufficient, but may still be entitled to great weight in connection with direct testimony."

In *Cave v. State*, 41 Tex. 182, it was held that in cases depending upon circumstantial evidence, full instruction upon that species of evidence is requisite and essential.

§ 354. **Comparative Weight of Direct and Circumstantial Evidence.**—With respect to the comparative weight due to direct

and presumptive evidence, it has been said that circumstances are in many cases of greater force and more to be depended on than the testimony of living witnesses; inasmuch as witnesses may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. *Annesley v. Lord Anglesea*, 17 How. St. Tr. 1430. It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognizance of a jury, and to require a greater number of witnesses, than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. See 3 Bentham, *Rationale of Judicial Evidence*, 251. On the other hand, it may be observed, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect him. And it may be observed, that circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence, and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences each of which may be fallacious. Phil. Ev. (10th ed.) 468; Phil. Ev. (8th ed.) 458; Roscoe, *Crim. Ev.* (7th ed.) 14.

The relative merit of evidence direct and circumstantial has proved fertile matter of controversy. On the one hand, it has been widely claimed in behalf of circumstantial evidence that, while witnesses lie, facts do not. *Rex v. Blandy*, 18 How. St. Tr. 1118, 1187; 6 Paley, *Moral and Political Philosophy*, chap. 9, Ram, *Facts* (3d Am. ed.) 287; Burnett, *Crim. Law of Scotland*, 523; 2 Burke's *Works* (H. & B.'s ed.) 624. On the other hand, frequent reference is made to lamentable instances of wrong conviction on such evidence. Ram, *Facts* (3d Am. ed.) 439-459. Each have their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an

indirect mode of proving that which otherwise might not be probable at all. Gilbert, Ev. (4th. ed.) 157; *Rea v. Burdett*, 4 Barn. & Ald. 95, 123.

"The force of circumstantial evidence," observes Mr. Starkie, "being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being, in the abstract, insufficient, unless they exclude every other supposition, it is essential to inquire, with the most scrupulous attention, what other hypothesis there may be agreeing wholly or partially with the facts in evidence. Those which agree even partially with the circumstances are not unworthy of examination, because they lead to a more accurate examination of those facts with which, at first, they might appear to be inconsistent; and it is possible that on a more accurate examination of these facts, their authenticity may be rendered doubtful, or even altogether disproved." The same able writer from whom this passage is quoted has another observation, which also should be kept in view, while dealing with the facts of this case.

"To acquit, on light, trivial, and fanciful suppositions, and remote conjectures, is a virtual violation of the juror's oath; while, on the other hand, he ought not to condemn, unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and unless he be so convinced by the evidence, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest." Phillips, Famous Cases Circ. Ev. 530.

§ 355. **Rules of Induction Specially Applicable to Circumstantial Evidence.**—Mr. Wills in his justly celebrated essay on the Principles of Circumstantial Evidence, tabulates a few of the leading rules which are closely identified with this topic.

"Rule 1.—The facts alleged as the basis of any legal inference must be clearly proved, and indubitably connected with the *factum probandum*.

* * * * *

"Rule 2.—The burden of proof is always on the party who asserts the existence of any fact which infers legal accountability. This is a universal rule of jurisprudence, founded upon evident principles of justice; and it is a necessary consequence, that the affirmant party is not absolved from its obligation because of the difficulty which may attend its application. No man can be

justly deprived of his social rights but upon proof that he has committed some act which legally involves the forfeiture of them. The law respects the *status in quo*, and regards every man as legally innocent until the contrary be proved. To prove a negative is in most cases difficult, in many impossible. Criminality, therefore, is never to be presumed. But, nevertheless, the operation of this rule may, to a certain extent, be modified by circumstances which create a counter-obligation, and shift the *onus probandi*. Lord Brougham said that the burden of proof often shifts about from one party to another in the progress of a cause, according as the evidence raises a presumption one way or the other. It follows, from the very nature of the circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction.

* * * * *

“Rule 3.—In all cases, whether direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits. The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence when he has it in his power to produce it, of which some interesting exemplifications appear in other parts of this essay. This rule applies *a fortiori* to circumstantial evidence, a kind of proof which, for reasons which have been already urged, is inherently inferior to direct and positive testimony; and, therefore, whenever such evidence is capable of being adduced, the very attempt to substitute a description of evidence not of the same degree of force, necessarily creates a suspicion that it is withheld from corrupt and sinister motives. Nor is the application of the rule confined to the proof of the principal fact; it is ‘the master rule which governs all the subordinate rules.’ . . . The rule is, however, necessarily relaxed, where its application becomes impracticable by the wrongful act of the party who would otherwise be entitled to claim its protection; as where a witness is kept out of the way by or on his behalf (*Reg. v. Guttridge*, 9 Car. & P. 471; *Reg. v. Scaife*, 20 L. J. M. C. 229; 2 Hawk, P. C. chap. 46, § 15); or a deed or other instrument in his possession, which he refuses, after notice, to produce. *Rev. v.*

Hunter, 3 Car. & P. 591, 4 Car. & P. 128; *Rex v. Haworth*, 4 Car. & P. 254.

"Considering, moreover, the inherent infirmity of human memory, in the fair construction and application of this rule, evidence ought in all criminal cases, and *a fortiori* in cases of circumstantial evidence, to be received with distrust, wherever any considerable time has elapsed since the commission of the alleged offense. . . . An unavoidable consequence of great delay is, that the party is deprived of the means of vindicating his innocence, or of proving the attendant circumstances of extenuation, the crime itself becomes forgotten, or is remembered but as a matter of tradition, and the offender may have become a different moral being; in such circumstances punishment can seldom, perhaps never, be efficacious for the purpose of example. On those accounts judges and juries are not always reluctant to convict parties charged with offenses committed long previously.

"Rule 4.—In order to justify the inferences of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. The awards of penal law can be justified only when the strength of our convictions is equivalent to moral certainty; which, as we have seen, is that state of the judgment, grounded upon an adequate amount of appropriate evidence, which induces a man of sound mind to act without hesitation in the most important concerns of human life. In cases of direct credible evidence, that degree of assurance immediately and necessarily ensues; but in estimating the effect of circumstantial evidence, there is of necessity an ulterior intellectual process of inference which constitutes an essential element of moral certainty. The most important part of the inductive process, especially in moral inquiries, is the correct exercise of the judgment in drawing the proper inference from the known to the unknown, from the facts proved to the *factum probandum*. A number of secondary facts of an inculpatory moral aspect being given, the problem is, to discover their causal moral source, not by arbitrary assumption, but by the application of the principles of experience in relation to the immutable laws of human nature and conduct. It is not enough, however, that a particular hy-

pothesis will explain all the phenomena; nothing must be inferred because, if true, it would account for the facts; and if the circumstances are equally capable of solution upon any other reasonable hypothesis, it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty; and they must therefore be discarded as conclusive presumptions of guilt. Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of innocence must therefore be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted.

* * * * *

Rule 5.—If there be any reasonable doubt of the guilt of the accused, he is entitled, as of right, to be acquitted. In other words, there must be no uncertainty as to the reality of the connection of the circumstances of evidence with the *factum probandum*, or as to the sufficiency of the proof of the *corpus delicti*, or, supposing those points to be satisfactorily established, as to the personal complicity of the accused. This is in strictness hardly so much a distinct rule as a consequence naturally flowing from, and virtually comprehended in the preceding rules. Indeed, it is more properly a test of the right application of those rules to the facts of the particular case. The necessity and value of such test is manifest from the consideration of the numerous fallacies incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the impossibility in all cases of drawing the line between moral certainty and doubt.

. . . While it is certain that circumstantial evidence is frequently most convincing and satisfactory, it must never be forgotten, as was remarked by that wise and upright magistrate, Sir Matthew Hale, that ‘persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt;’ (2 Hale, P. C. chap. 39; see *Rex v. Thornton*, Warwick Autumn Assizes, 1817) wherefore, as he justly concludes, ‘this kind of evidence must be warily pressed.’

‘It is safer . . . to err in acquitting than in convicting, and better that many guilty persons should escape than that one innocent man should suffer.’ 2 Hale, P. C. chap. 39. Paley controverts the maxim, and urges that ‘he who falls by a mistaken sentence may be considered as falling for his country, while he suffers under

the operation of those rules by the general effect and tendency of which the welfare of the community is maintained and upheld." 6 Mor. & Pol. Phil. chap. 9. There is no judicial enormity which may not be palliated or justified under color of this execrable doctrine, which is calculated to confound all moral and legal distinctions; its sophistry, absurdity, and injustice have been unanswerably exposed by one of the ablest of lawyers and most upright of men. Romilly, Observation on the Common Law of England, 72; Best, Presumptions, 292. Justice never requires the sacrifice of a victim; an erroneous sentence is calculated to produce incalculable and irreparable mischief to individuals, to destroy all confidence in the justice and integrity of the tribunals, and to introduce an alarming train of social evils as the inevitable result." Wills, Circ. Ev. chap. 6. pp. 173-194.

§ 356. **The Rule in Civil Actions Having Criminal Attributes.**—It is quite usual in civil actions, for the court to instruct the jury that the mere preponderance of evidence is sufficient to justify a verdict for the plaintiff or defendant in the litigation as the case may be. But, in those civil actions where a criminal act is alleged, the attributes of a criminal act follow the allegation. And the party seeking to sustain such an averment, must comply with the rule in criminal actions, and establish the allegation beyond a reasonable doubt. *Blaeser v. Milwaukee M. Mut. Ins. Co.* 37 Wis. 31, 19 Am. Rep. 747; *Thurtell v. Beaumont*, 1 Bing. 339; *Washington U. Ins. Co. v. Wilson*, 7 Wis. 169; *McConnell v. Delaware Mut. S. Ins. Co.* 18 Ill. 228; *Weston v. Gravelin*, 49 Vt. 507; *Thayer v. Boyle*, 30 Me. 475; *Bradish v. Bliss*, 35 Vt. 326; *Butman v. Hobbs*, 35 Me. 228; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *White v. Comstock*, 6 Vt. 405; *Barfield v. Britt*, 47 N. C. 41, 62 Am. Dec. 190; *Brooks v. Claves*, 10 Vt. 37; *Kincade v. Bradshaw*, 10 N. C. 63; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; *Kane v. Hibernia Ins. Co.* 39 N. J. L. 697, 23 Am. Rep. 239; *Freeman v. Freeman*, 31 Wis. 235; *Folsom v. Brawn*, 25 N. H. 122; *Scott v. Home Ins. Co.* 1 Dill, 105; *Rothschild v. American Cent. Ins. Co.* 62 Mo. 356; *Munson v. Atwood*, 30 Conn. 102; *Watkins v. Wallace*, 19 Mich. 57; *State v. Goldsborough*, 1 Houst. Crim Rep. 316; *Burr v. Willson*, 22 Minn. 206; *Schnell v. Toomer*, 56 Ga. 168; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Welch v. Jugenheimer*, 56 Iowa, 11, 41 Am. Rep. 77; *Ellis v. Buzzell*,

60 Me. 209, 11 Am. Rep. 204; *Barton v. Thompson*, 46 Iowa, 30, 26 Am. Rep. 131; *Knowles v. Scribner*, 57 Me. 495; *Kendig v. Overhulser*, 58 Iowa, 195; *Schmidt v. New York U. Mut. F. Ins. Co.* 1 Gray, 529; *Ætna Ins. Co. v. Johnson*, 11 Bush, 587, 21 Am. Rep. 223; *Hoffman v. Western M. & F. Ins. Co.* 1 La. Ann. 216; *Sloan v. Gilbert*, 12 Bush, 51, 23 Am. Rep. 708; *Wightman v. Western M. & F. Ins. Co.* 8 Rob. (La.) 442.

PART IV.

EVIDENCE FOR THE DEFENSE.

CHAPTER XLIV.

EVIDENCE OF SELF-DEFENSE.

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§ 357. **Preliminary Remarks.**—All civilized communities as well as savage conditions recognize the principle of lawful resistance; but it is the province only of the higher civilization to prescribe the limits within which this resistance is to act, and within which when shown, it will declare the exoneration of the party resisting. The most expert publicists sanction “lawful resistance” to the commission of a crime. It is the first duty of the citizen to prevent it, and his only concern in preventing it is to take care that the methods he employs are lawful.

Resistance sufficient to prevent the crime may be made by the party about to be injured: (1) To prevent a crime against his person; (2) To prevent an illegal attempt by force to take or injure property in his lawful possession. Any other person, in

aid or defense of the person about to be injured, may make resistance sufficient to prevent the injury. N. Y. Code Crim. Proc. §§ 80, 81.

So by a parity of reasoning any evidence is pertinent in a criminal prosecution, that serves to show that the acts of the parties were in good faith designed to prevent a crime, and that the parties so acting, although so unfortunate as to inflict an injury personal or otherwise, were acting in concert with the officers of justice or by their express command. It should be added that in capital cases the widest latitude should be given to the evidence for the defense, this always has been the rule from the time of Lord Hale. 2 Hale, P. C. 290; *Austin v. State*, 14 Ark. 559; *Johnson v. State*, 14 Ga. 61; *Moore v. State*, 2 Ohio St. 500.

It may be further said, that when a person is subjected to maltreatment by another, he may seek protection from the authorities, and even that it is his duty to do so, as a conservator of the peace, but the omission to do it does not in any wise deprive him of the protection of the law, and when assailed, he may defend himself in the same manner, and to the same extent, and by the same means, as if he had sought the protecting arm of the law. The question is not, in such cases, whether the prisoner has sought that remedy, but whether he was in imminent peril, or was justified in believing himself to be, when he did the act complained of.

§ 358. **What must Appear to Justify the Claim of Self-defense.**—In the majority of criminal prosecutions for homicide and assault and battery, self-defense is interposed by way of justification. In all instances where it is sought to uphold such a contention it must appear that there was no apparent mode of escape open to the defendant.

The correct rule will find expression in the following language: "Where a person is unlawfully assaulted by another, the party assaulted has a right to defend himself and to use sufficient force to make his defense effectual. But the law never permits the unnecessary use of force; therefore, when a man is attacked he must not use force to defend himself, if he can otherwise protect himself. If he has other means or ways of avoiding the assault that appear to him at the time sufficient and available and that are in fact sufficient and available he must resort to them and

cannot justify the force for his defense, or in that case its use cannot justify the force for his defense, for in that case its use would be unnecessary." *Harrison v. Harrison*, 43 Vt. 417; *State v. Sloan*, 47 Mo. 604; *State v. Collins*, 32 Iowa, 36; *State v. Goodrich*, 19 Vt. 116, 47 Am. Dec. 676; *Com. v. Crawford*, 8 Phila. 490; *State v. Wood*, 53 Vt. 560; *Com. v. Scott*, 1 Pa. L. T. N. S. 221; *Halloway v. Com.* 11 Bush, 344; *Kendall v. State*, 8 Tex. App. 569; *State v. Dixon*, 75 N. C. 275; *Presser v. State*, 77 Ind. 274; *People v. Coughlin*, 65 Mich. 704; *State v. Matthews*, 78 N. C. 523; *Duncan v. State*, 49 Ark. 543; *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52; *People v. Gonzales*, 71 Cal. 569; *Fortenberry v. State*, 55 Miss. 403; *Steinmeyer v. People*, 95 Ill. 383; *State v. Parker*, 96 Mo. 382; *State v. Donnelly*, 69 Iowa, 705, 58 Am. Rep. 234; *Panton v. People*, 114 Ill. 505; *State v. Partlow*, 90 Mo. 608, 55 Am. Rep. 31.

A party assaulted is justified in using such force as is necessary to repel an assailant, but no more; and if unnecessary force is used he becomes the assailant. *Gallagher v. State*, 3 Minn. 270; *People v. Williams*, 32 Cal. 280; *People v. Campbell*, 30 Cal. 312; *Rasberry v. State*, 1 Tex. App. 664; *Stewart v. State*, 1 Ohio St. 66; *People v. Anderson*, 44 Cal. 65. But it is well settled that the degree of force must not exceed the bounds of defense and prevention; and this depends on the circumstances of each case; and the respective condition of the parties. *Gallagher v. State*, *supra*; *State v. Quin*, 3 Brev. 515; *People v. Doe*, 1 Mich. 451; *Patten v. People*, 18 Mich. 314; *Cotton v. State*, 31 Miss. 504; *Jackson v. State*, Horrigan & T. Cases on Self-defense, 476; *Oliver v. State*, 17 Ala. 587.

There must be at least a seeming necessity, an actual necessity, or a reasonable belief of such necessity, to ward off some impending harm. *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 416; *State v. Burke*, 30 Iowa, 331; *Oliver v. State*, *supra*; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *Reg. v. Bull*, 9 Car. & P. 22; *Dill v. State*, 25 Ala. 15.

Men, when threatened with danger, must determine the necessity of resorting to self-defense, and they will not be held responsible for a mistake in the extent of the actual danger, nor be subject to the peril of making that guilty, if appearance prove false, which would be innocent if they prove true. *Campbell v.*

People, 16 Ill. 17, 61 Am. Dec. 49; *Meredith v. Com.* 18 B. Mon. 49; *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286; *Pond v. People*, 8 Mich. 160; *State v. Sloan*, 47 Mo. 604.

Necessity is a defense when the act charged was done to avoid irreparable evil, from which there was no other adequate means of escape, and the remedy was not disproportionate to the threatened evil; and the necessity must not have been created by the fault of him who pleads it, nor be the result of his own culpability, nor be rashly rushed into. *Farris v. Com.* 14 Bush, 362; *Rex v. Stratton*, 21 How. St. Tr. 1045; *State v. Starr*, 38 Mo. 270; *Haynes v. State*, 17 Ga. 465; *Roach v. People*, 77 Ill. 25; *The Argo*, 1 Gall. 150; *Reg. v. Dunnett*, 1 Car. & K. 425; *The Joseph*, 12 U. S. 8 Cranch, 451, 3 L. ed. 621; *The New York*, 16 U. S. 3 Wheat. 59, 4 L. ed. 333; *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286; *Logue v. Com.* 38 Pa. 265, 80 Am. Dec. 481; *State v. Smith*, 10 Nev. 106; *Vaiden v. Com.* 12 Gratt. 717; *State v. Underwood*, 57 Mo. 40; *State v. Linney*, 52 Mo. 40; *State v. Neeley*, 20 Iowa, 108; *State v. Stanley*, 33 Iowa, 526; *Com. v. Selfridge*, Horrigan & T. Cases on Self-defense, 3; *Isaacs v. State*, 25 Tex. 174. See *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 416. The authorities are believed to be quite consistent in maintaining this principle.

It is laid down and believed to be undoubted law, that, in all cases of slight and insufficient provocation, if it may be reasonably inferred from the weapon made use of, or the manner of using it, or from any other circumstance, that the party intended merely to do some great bodily harm, such homicide will be murder in the second degree, in like manner as if no provocation had been given, but not a case of murder in the first degree. *McDaniel v. Com.* 77 Va. 281; Davis, Crim. L. 99.

Cases arise, as all agree, where a person assailed may, without retreating, oppose force to force, even to the death of the assailant; and other cases arise in which the accused cannot avail himself of the plea of self-defense, without showing that he retreated as far as he could with safety; and then killed the assailant only for the preservation of his own life. Foster, Crim. L. 275; 1 East. P. C. 277; 4 Bl. Com. 184.

Courts and text-writers have not always stated the rules of decision applicable in defenses of the kind in the same forms of expression. None more favorable to the accused have been

promulgated anywhere than those which were adopted seventy years ago, in the trial of Selfridge for manslaughter. Pamph. Rep. 160; Harrigan & T. Cases on Self-defense, 1.

Three propositions were laid down in that case:

1. That a man who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. 2. That when the attack upon him is sudden, fierce and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all. 3. That when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Learned jurists excepted at the time to the third proposition, as too favorable to the accused; but it is safe to affirm that the legal profession have come to the conclusion that it is sound law, in a case where it is applicable. Support to that proposition is found in numerous cases of high authority. *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941.

§ 359. **Self-defense Rests upon Necessity.**—"Self-defense, therefore, rests upon necessity, actual or apparent. A common assault, not actually or apparently endangering life or doing great bodily harm, will not excuse a homicide in repelling it. . . . The danger of death or great bodily harm must be real, or honestly believed to be so, and on reasonable grounds. The danger must be apparent and imminent, and existing at the time of the fatal injury, or honestly believed to be so, and on reasonable grounds. The belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the purpose to kill or do great bodily harm then exists, and the fear that it will at that time be executed." *Barnards v. State*, 88 Tenn. 229.

When a man is placed in such a position that a reasonably prudent man, by the circumstances and facts surrounding him, would have in good faith a well-founded belief that his life was in peril,

then he would be justified in using such means in defense of himself, as might fairly appear to be necessary. *White v. Territory*, 3 Wash. Ter. 397.

An act done from necessity raises no presumption of a criminal intent, but the necessity must be actual, imminent and apparent, with no other probable or possible means of escape. It must be great, and must arise from imminent peril to life or limb. *Olive v. State*, 17 Ala. 587. See *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Kennedy v. Com.* 14 Bush, 341; *Farris v. Com.* 14 Bush, 363; *May v. State*, 6 Tex. App. 191; *Blake v. State*, 3 Tex. App. 581; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *People v. Sullivan*, 7 N. Y. 396; *Com. v. Drum*, 58 Pa. 9; 4 Bl. Com. 28; 1 Hale, P. C. 43, 52; 1 Bishop, Crim. L. (6th ed.) § 346.

So in *Logue v. Com.* 38 Pa. 265, 80 Am. Dec. 481, Thompson, *J.*, quoting the language used by Bronson, *J.*, in the case of *Shorter v. People*, 2 N. Y. 193, 51 Am. Dec. 286, says:

"I take the rule to be settled that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance. Then the killing may be excusable, even if it turn out afterwards that there was no actual danger.

"The law of self-defense is a law of necessity, and that necessity must be real, or bear all the semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable or excusable. Whenever it is set up, the case will always call for a most careful and searching scrutiny, to be sure that it rests, where alone it can rest, on the ground of real or apparently real necessity." *Panton v. People*, 114 Ill. 505, 5 Am. Crim. Rep. 425, *note*.

§ 360. **Extent of the Retreat.**—A man is not required to do everything in his power to avoid the necessity of slaying his assailant. Where there is no escape, after retreating as far as possible, killing will be justifiable; so where retreat is impossible or perilous, or would increase the danger; or where further retreat is prevented by some impediment, or was as far as the fierceness of the assault permitted. But if the assaulted party is in fault, he is bound to retreat as far as he can safely do so; he is required to decline the combat in good faith. *Phillips v. Com.* 2 Duv.

328; *Bohannon v. Com.* 8 Bush, 481; *People v. Sullivan*, 7 N. Y. 396; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *Logue v. Com.* 38 Pa. 265, 80 Am. Dec. 481; *Meredith v. Com.* 18 B. Mon. 49; *Reg. v. Smith*, 8 Car. & P. 160; *Creek v. State*, 24 Ind. 151; *Tweedy v. State*, 5 Iowa, 433; *Com. v. Selfridge*, *Harrigan & T. Cases on Self-defense*, 1; *Vaiden v. Com.* 12 Gratt. 717; *Erwin v. State*, 29 Ohio St. 186; *Davison v. People*, 90 Ill. 221; *State v. Ingold*, 49 N. C. 216; *State v. Hill*, 20 N. C. 491; *State v. Chavis*, 80 N. C. 353.

He is not obliged to retreat or to go to the wall from an assailant armed with a deadly weapon; and if he is driven to the wall so that he must be killed or sustain great bodily harm, and therefore kills his assailant, it is excusable homicide. *State v. Ingold*, *Phillips v. Com.* and *Tweedy v. State*, *supra*; *Smaltz v. Com.* 3 Bush, 32; *Young v. Com.* 6 Bush, 312; *Carico v. Com.* 7 Bush, 124. But see *Bohannon v. Com. supra*; *Carroll v. State*, 23 Ala. 28; *Pond v. People*, 8 Mich. 150; 1 East, P. C. 271; Desty, Am. Crim. L. 31.

And if he uses all the means in his power to escape, even killing in self-defense is lawful. *Com. v. Selfridge*, *Horrigan & T. Cases on Self-defense*, 1; *People v. Doe*, 1 Mich. 451; *People v. Sullivan*, *State v. Shippey*, and *Bohannon v. Com. supra*.

In 1803, Mr. East published his excellent Treatise on the Pleas of the Crown, and on page 271, says, in speaking of homicide from necessity: "Herein may be considered: 1. What sort of attack it is lawful and justifiable to resist, even by the death of the assailant, and where the party is without blame. 2. Where such killing is only excusable, or even culpable, and the party is not free from blame," etc. In relation to the first sort, the author says: "1. A man may repel force by force, in defense of his person, habitation or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured him from all danger; and, if he kill him in so doing, it is called justifiable self-defense; as, on the other hand, the killing, by such felon, of any person so lawfully defending himself, will be murder. But a bare fear of any of these offenses, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any

overt act indicative of such an intention, will not warrant in killing that other by way of prevention. There must be an actual danger at the time." *Erwin v. State*, 29 Ohio St. 186.

A very brief examination of the American authorities makes it evident that the doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on a general subject of the right of self-defense. *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52. This principle has been carried to its full extent in several of our decisions and has been vindicated in many others that are not reported.

§ 361. **When Heroic Methods may be Employed.**—Respectable authority exists in favor of the proposition, that where the evidence clearly discloses the presence or imminency of great danger, resort may be had to heroic methods, even the taking of life. In 1 Rutherford's Institutes of Natural Law, chap. 16, § 5, it is said, that the law of nature "cannot be supposed to oblige a man to expose his life to such danger as may be guarded against; and to wait till the danger is just coming upon him, before it allows him to secure himself." Also the following passage from the same section: "I see not, therefore, any want of benevolence which can be reasonably charged upon a man in these circumstances, if he takes the most obvious way of preserving himself, though perhaps some other method might have been found out, which would have preserved him as effectually, and produced less hurt to the aggressor, if he had been calm enough, and had been allowed time enough to deliberate about it."

He also cited *Grainger v. State*, 5 Yerg. 459, to the effect that, "if a man, though in no great danger of serious bodily harm, through fear, alarm or cowardice, kill another, under the impression that great bodily injury is about to be inflicted on him, it is neither murder or manslaughter, but self-defense." See also *The Marianna Flora*, 24 U. S. 11 Wheat. 51, 6 L. ed. 417; *The Louis*, 2 Dod. Adm. 264; 13 Bacon's Works, by Montagu (London ed. 1831) 160; 4 Bl. Com. 186.

§ 362. Threats Considered in Relation to Self-Defense.—

Threats of violence by the deceased against the accused, though not communicated to the latter, are admissible as evidence where there is any doubt as to who began the encounter. They tend to show that it was the intention of the deceased at the time of the meeting to attack the accused, and hence tend to prove that the former brought on the conflict, and are relevant evidence. If all the evidence is to the effect that the defendant was the aggressor, it is not admissible. *Wilson v. State* (Fla.) 17 L. R. A. 654, and note, reproduced by permission.

NOTE.—*Evidence in a criminal case of threats of accused, or of person injured or killed.*

1. Threats by the defendant.

It is competent to show that the prisoner had made previous threats to kill his victim. *Pulliam v. State*, 88 Ala. 1; *Babcock v. People*, 13 Colo. 515; *Rains v. State*, 88 Ala. 91; *Hodge v. State*, 26 Fla. 11; *State v. Elkins*, 101 Mo. 344; *People v. Jones*, 99 N. Y. 667; *State v. McKinney* (Kan.) March 6, 1884; *State v. McCahill*, 72 Iowa, 111; *Howard v. State*, 25 Tex. App. 686; *Schoolcraft v. People*, 5 West. Rep. 474, 117 Ill. 271; *Griffin v. State*, 90 Ala. 596; *State v. Dickson*, 78 Mo. 438.

Threats by the defendant in a trial for murder are admissible to show his animus toward the deceased. *White v. Territory*, 3 Wash. Ter. 397; *People v. Brown*, 76 Cal. 573; *Cribbs v. State*, 86 Ala. 613; *State v. Glahn*, 97 Mo. 679; *Nichols v. Com.* 11 Bush, 575; *Casat v. State*, 40 Ark. 511; *State v. Dickman*, 11 Mo. App. 538.

This although he was drunk at the time of making the threats. *Smith v. Com.* (Ky.) June 2, 1887.

On the trial of a man for the murder of his wife, his threats to shoot or kill the deceased are admissible. *People v. Simpson*, 48 Mich. 474.

In *Goodwin v. State*, 96 Ind. 550, 4 Crim. L. Mag. 565, threats of the accused to shoot deceased, made thirty years before the homicide, were admitted, there being other evidence of long continued hostility. Elliott, J., said: "Threats against life are always admissible against an accused, but their remoteness from the time of the homicide is a circumstance to be considered in determining the weight and effect to be assigned them."

On a trial for assault with intent to kill, it appearing that the defendant and the woman injured had lived in adultery for some time and that she had left him and refused to return, and his threats in consequence of her refusal to do so, is competent to show motive. *Walker v. State*, 85 Ala. 7.

On a trial for assault proof is admissible of threats made a few hours before. *State v. Henn*, 39 Minn. 476. *

The fact of a previous difficulty between defendant and a person assaulted by him and his threats against such person may be proved in the prosecution for assault with intent to murder, to show malice in motive. *Lawrence v. State*, 84 Ala. 424.

a. Subsequent threats.

A declaration by the prisoner who returned to the place of killing half an hour after the fatal blow was struck, "that he had come to kill" the deceased

may be admitted to show his hostile feeling. *McManus v. State*, 36 Ala. 285.

Where the defendant, in the court-house, after the indictment was found, and about two weeks before the trial, said to the injured party, "I'll get you yet," this was held admissible as referring to the past act and including an implied admission of the previous attempt. *Walker v. State*, 85 Ala. 7.

Evidence of what preceded and followed between the parties is admissible to show that the language used in a letter imported a threat of the character mentioned in N. Y. Penal Code, § 538. *People v. Gillian*, 50 Hun, 35.

Evidence of threats to do the plaintiff bodily harm, made by the defendant before an alleged assault, or so immediately after it as to constitute part of the transaction, is competent. *Caverno v. Jones*, 61 N. H. 653.

2. Threats by the deceased.

a. Communicated threats.

Threats made by deceased a short time before commission of the homicide indicating an angry and revengeful spirit toward prisoner and a determination to do violence to his person, communicated to prisoner, are admissible. *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Powell v. State*, 52 Ala. 1.

An isolated complete sentence containing a threat by the accused against deceased is admissible on a trial for murder, although the witness did not hear and could not relate the whole of the conversation. *State v. Oliver*, 43 La. Ann. 1003.

It is competent for the prosecution in a murder trial to prove a former difficulty and any threats made by defendant in connection therewith. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

This although it is not competent to prove the particulars of such difficulty. *Stitt v. State*, 91 Ala. 10, 24 Am. St. Rep. 853.

Evidence of communicated threats is admissible to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred. *State v. Evans*, 33 W. Va. 417; *Wood v. State*, 92 Ind. 269.

Testimony on a murder trial, as to a meeting and altercation between deceased and defendant on the evening of the killing, in which deceased made threats against defendant, is admissible as tending to throw light upon the feeling existing between them. *White v. State*, 30 Tex. App. 652.

Naked threats unaccompanied with personal violence are admissible to show reasonableness of prisoner's fears provided a knowledge of threats is brought home to him. *Pitman v. State*, 22 Ark. 354; *Howell v. State*, 5 Ga. 48; *Monroe v. State*, 5 Ga. 85.

Evidence of threats by deceased against defendant, who killed him, though not affording a justification, is admissible, as it may operate in mitigation of the offense. *Howard v. State*, 23 Tex. App. 265.

A declaration of deceased in the nature of a threat against defendant, made a few days before his death, is competent evidence on the murder trial as a circumstance tending to show that the deceased was the aggressor. *Brown v. State*, 55 Ark. 593.

Evidence of threats made by the deceased some days prior to the killing, at which time the accused was in fear of the deceased, was held admissible, where at the time of the killing the defendant was without fault and was in imminent danger of an attack, to show the purposes and motives of the deceased in making the attack. *State v. Dodson*, 4 Or. 64.

In *Hudgins v. State*, 2 Kelly (Ga.) 181, a son of the accused testified that he said to the latter: "Yonder comes John Anderson (deceased) and he will kill you." Lumpkin, J., said: "Had young Hudgins informed his father that Anderson was advancing in great haste, apparently much enraged, that he was using threats of personal violence, armed with a weapon, and the like, all this would be admissible to satisfy the jury that the homicide was in self-defense. The opinion of the witness is a very different thing." See also *State v. Goodrich*, 19 Vt. 117, 47 Am. Dec. 676.

(1.) *Overt act of hostile demonstrations.*

Threats of personal injuries, or even against the life of another, will not justify killing the one making them when he is doing nothing to carry them into effect. *Gilmore v. People*, 13 West. Rep. 509, 124 Ill. 380; *People v. Iams*, 57 Cal. 115.

Proof of threats by the deceased will have no effect in extenuating the crime when he was at the time of the killing making no effort to execute them. *State v. Harris*, 59 Mo. 550.

Threats though communicated are not admissible when the killing was not done in self-defense. *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Green v. State*, 69 Ala. 6.

Evidence that deceased carried weapons and threatened to use them was excluded where there was no evidence that the prisoner committed the homicide in self-defense. *People v. Garbutt*, 17 Mich. 9.

The Criminal Code of Texas provides that "where a defendant accused of murder seeks to justify himself on the ground of threats made against his own life, he may be permitted to introduce evidence of threats made, but the same shall not be regarded as affording a justification of the offense unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threats so made." Paschal, Dig. art. 2270; *Peck v. State*, 5 Tex. App. 611.

Evidence of threats is admissible when they were communicated to the accused previous to the killing, and when it appears that at the time of the killing the deceased made overt acts, indicative of a present intention to execute the threats. *Johnson v. State*, 66 Miss. 189; *State v. Stewart*, 9 Nev. 130; *State v. Hall*, 9 Nev. 58; *State v. Harrington*, 12 Nev. 125; *People v. Scoggins*, 37 Cal. 683; *State v. Harrod*, 102 Mo. 590.

When deceased has made threats against prisoner which he at the time of the killing shows an intention of executing evidence of such threats should be submitted to the jury to be considered by them in determining whether or not "adequate cause" for the homicide existed. *Alexander v. State*, 25 Tex. App. 260, 8 Am. St. Rep. 438.

Threats of the deceased are admissible on a trial for murder although not part of the *res gestæ* and there is no doubt as to who began the difficulty, where there is the slightest evidence tending to show the hostile demonstration by him which may reasonably be regarded as placing the accused in apparent imminent danger of life or of great bodily harm. *Garner v. State*, 28 Fla. 113.

But not if the homicide was committed in cold blood upon a person unarmed and retreating. *Thomason v. Territory*, 4 N. M. 150.

Or if the homicide was the result of the defendant's invitation to fight. *State v. Wilson*, 43 La. Ann. 840.

Or if the defendant in any way provoked the occasion which produced the killing. *Levy v. State*, 28 Tex. App. 203, 19 Am. St. Rep. 826.

Evidence of prior threats is not admissible in support of a plea of self-defense in homicide, unless they have been followed by an overt act or hostile demonstration at the time of killing of such a character as to indicate that the deceased was then and there about to execute such threats, and to justify defendant in believing that his life was in such apparently imminent danger as to authorize him to take his adversary's. *State v. Cosgrove*, 42 La. Ann. 753; *State v. Guillory*, 44 La. Ann. —; *Smith v. State*, 25 Fla. 517; *People v. Halliday*, 5 Utah, 467; *Hinson v. State*, 66 Miss. 532; *State v. Brooks*, 39 La. Ann. 817; *State v. Hays*, 23 Mo. 287; *State v. Demarest*, 41 La. Ann. 617; *Holly v. State*, 55 Miss. 424; *Nash v. State*, 2 Tex. App. 362; *Territory v. Campbell*, 9 Mont. 16.

Evidence of threats by the deceased the day previous to the killing, to the effect that he and another would come at night and pull the house down, was allowed on a trial for murder. *Meade's & Belt's Case*, 1 Lew. C. C. 184.

Threats of rioters that they would return another night soon after, to the defendant's house and break in if they were not admitted were allowed in evidence to establish a reasonable ground of the prisoner's apprehension. *People v. Rector*, 19 Wend. 567.

Evidence is competent on a trial for murder, of threats by the deceased to take the life of a person who was in a house which the former was violently attempting to enter at the time he was killed. *King v. State*, 55 Ark. 604.

On a trial of two persons jointly indicted for murder, threats against deceased, made by one of them in the absence of the other, are admissible but not to be considered so far as the other is concerned. *State v. McKinzie*, 102 Mo. 620.

And the fact that the testimony in a murder trial, in regard to an overt act of violence by the deceased is conflicting, is no ground for excluding evidence of threats made by him. *Garner v. State*, 28 Fla. 113.

b. Uncommunicated threats.

Concerning the admission of uncommunicated threats in cases of homicide there has been much conflict of authority. In *People v. Arnold*, 15 Cal. 476, it was said that threats to be admissible for any cause must be shown to have been communicated to the accused. See also *Powell v. State*, 19 Ala. 577; *Edgar v. State*, 43 Ala. 48; *Burns v. State*, 49 Ala. 370; *Rogers v. State*, 62 Ala. 170; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281.

In *Lingo v. State*, 29 Ga. 470, it was held that uncommunicated threats of the deceased are inadmissible where it is shown that at the time of the killing he acted only in self-defense.

Threats of personal injury made by deceased against prisoner half an hour before the shooting, not communicated to the latter, could not have influenced the latter and were therefore immaterial. *State v. Maloy*, 44 Iowa, 104.

The admissibility of antecedent threats by the deceased depends upon the fact of their having been communicated to the accused as a condition precedent; and the court may well refuse to admit them until this necessary foundation is laid, just as the admission of the testimony of deceased or absent witnesses is refused until the death or absence is proved. *State v. McCoy*, 29 La. Ann. 593; *State v. Gregor*, 21 La. Ann. 473.

Newly discovered evidence to the effect that deceased had a few days before the killing said that he intended to kill the prisoner, will not authorize a new trial when defendant did not know of the statement at the time of the killing and could not have done the killing on account of fears induced through a knowledge of it. *Peterson v. State*, 50 Ga. 142; *Carr v. State*, 14 Ga. 358.

Formerly uncommunicated threats, made by the deceased against the accused, were not competent evidence for the latter unless they constituted a part of the *res gestæ*. *Carroll v. State*, 23 Ala. 28.

§ 343. Threats Competent to Show Intent.

But the more modern cases favor the admission of such evidence in the following cases:

(a) *To show who began the affray.*

"Where A is charged with a murderous assault upon B, or with killing B (the plea of self-defense not being set up) remarks or threats affecting A, made by B to a third party before the assault, are not admissible in A's behalf; especially when it does not appear at what time they are communicated to him. Yet, if the question is whether the deceased was the assailant, the fact that he declared beforehand that he meant to attack the defendant is material; nor, on this issue, is it necessary that the defendant should be proved to have had notice of such threats." 1 Whart. Crim. L. § 642; *Hart v. Com.* 85 Ky. 77, 7 Am. St. Rep. 576.

Where the question is as to who began the difficulty uncommunicated threats are admissible. *Sparks v. Com.* 89 Ky. 644; *Levy v. State*, 28 Tex. App. 203; *State v. Alexander*, 66 Mo. 148; *State v. Lee*, 66 Mo. 165; *Roberts v. State*, 68 Ala. 156.

In *Little v. State*, 6 Baxt. 493 (approved in *Potter v. State*, 85 Tenn. 88) McFarland, J., said: "In all cases where the acts of the deceased are of a doubtful character, then evidence which may tend to show that he sought the meeting, or began or provoked the combat, is admissible, and, in this view previous threats made by the deceased, though not communicated to the prisoner, may yet tend to show the animus of the deceased, and to illustrate his conduct and motives, and in some cases might be important, in the absence of more direct evidence, to show which party began or provoked the fight."

When a fatal encounter occurs and it is doubtful which of the two commenced the affray, the declaration of the prisoner at the time of the purchase of a pistol that he meant to use it on the deceased is admissible for the consideration of the jury. *People v. Arnold*, 15 Cal. 476.

In this case (cited with approval in *People v. Scoggins*, 37 Cal. 676) Mr. Justice Baldwin in delivering the opinion of the court, said: "It shows in other words the purpose for which the weapon was procured. This leads us to the inquiry whether the fact that A procures a weapon for a particular purpose conduces at all to show in a question of conflicting proofs as to the manner in which he used it what that manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and an encounter happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal as to which one of the two commenced the affray, some light might be thrown upon this question conducing to or toward its solution by the proof of these facts as to A's procuring it, and his motives in doing so. The jury might possibly with some reason, conclude that as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault in other

words was made in pursuance of the intended purpose when the weapon was procured, and especially if other facts in corroboration of this conclusion existed. It is true there would be nothing conclusive in this. But the fact of the conclusiveness of this proof to establish the proposition which it is introduced to prove is not the decisive question. The question is, whether this item of fact be a matter proper to be considered by the jury in arriving at their conclusion upon this mooted point. And we have no doubt that it is; that it may enter into the deliberations of the jury with all the other facts as a matter to be weighed by them with the rest of the proofs."

In a prosecution for an assault, where there is doubt as to which is the aggressor, uncommunicated threats by one party, preceding the affray, are admissible to show his animus towards the other party, as tending to show that he was the aggressor. *State v. Bailey*, 13 West. Rep. 620, 94 Mo. 311.

(b) *To corroborate evidence of communicated threats.*

When it has been shown on a trial for murder that a short time before the killing the deceased made threats against the prisoner which were communicated to him it is error to exclude proof of uncommunicated threats made by deceased only a few days previous to the killing. *Cornelius v. Com.* 15 B. Mon. 539.

Where communicated threats followed by a subsequent homicide have been proved, evidence of other threats made between the communicated ones and the assault may be received as corroborative and explanatory. *State v. Williams*, 40 La. Ann. 168; *Levy v. State*, 28 Tex. App. 203; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *Roberts v. State*, 68 Ala. 156.

Where it was shown that certain threats, communicated to the prisoner, had been made by the deceased, and that deceased had followed the prisoner to a house, and that in the fatal encounter a rock had been used by the deceased, uncommunicated threats were held admissible (1) to corroborate the evidence of the threats already made; (2) to show the state of feeling of the deceased and the *quo animo* with which he had pursued his enemy; (3) to fix the ownership of the rock. *State v. Turpin*, 77 N. C. 473, 24 Am. Rep. 455.

(c) *To show the attitude of the deceased.*

Uncommunicated threats are not admissible when, at the time of the conflict, the deceased was making no hostile demonstration. *Newcomb v. State*, 37 Miss. 383; *State v. Scott*, 26 N. C. 415, 42 Am. Dec. 148; *State v. Taylor*, 64 Mo. 358.

But evidence of previous uncommunicated threats made by the injured party against the accused is admissible on a trial for assault with intent to kill where the circumstances in evidence properly raise a case of self-defense. *Bell v. State*, 66 Miss. 192; *Roberts v. State*, 68 Ala. 156.

The rules laid down in *Roberts v. State*, *supra*, were said to be in full accord with the true doctrine as established by the more recent cases of the highest courts in this country, although not in harmony with the former decisions of this court. See *Powell v. State*, *Edgar v. State*, *Burns v. State*, and *Rogers v. State*, *supra*.

And "where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting

the deceased was seeking the defendant's life." Whart. Crim. L. 1027, affirmed in *Davidson v. People*, 4 Colo. 145; *Wiggins v. Utah*, 93 U. S. 467, 23 L. ed. 942. See also *State v. Evans*, 33 W. Va. 417.

Where there was a feud of several years' standing between the deceased and the prisoner, and the deceased had repeatedly made threats to take the life of the prisoner, which had been communicated to the latter, an uncommunicated threat made just prior to the fatal encounter should have been admitted in evidence to show the jury the attitude of the deceased at the time. *Davidson v. People*, 4 Colo. 145.

A conversation held two days before the killing in which deceased made threats against prisoner was held admissible as a substantive fact to show the evil intent with which deceased went to the place where the accused was, to throw light upon the conduct of the deceased up to the time of the killing and to illustrate the transaction. *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269.

In this case Lumpkin, J., said: "The true distinction we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: when sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely, the state of feeling entertained by deceased toward the accused, it is competent testimony whether a knowledge of the threats be brought home to the defendant or not."

In *Peterson v. State*, 50 Ga. 142, it was said that the Keener case carries the question of the admissibility of much testimony to the point of extreme liberality, and the court declared that it would not go any further in the direction of that case than its term required. See also *Hoyes' Case*, 39 Ga. 718.

Where the guilt or innocence of a person charged with murder depends materially upon the question whether he had reasonable ground to believe himself to be in danger when the deceased was advancing upon him with a drawn knife, proof of threats previously made by the deceased is admissible though they are not shown to have been communicated to the defendant. *Miller v. Com.* (Ky.) 10 Ky. L. Rep. 672; *White v. Territory*, 3 Wash. Ter. 397.

A threat made by the deceased on the day before the killing that he would elect his man at the election which was to occur next day, or kill the deceased, was held to be admissible as affecting the question of whether the killing was done in self-defense, although not communicated. *Hart v. Com.* 85 Ky. 77, 7 Am. St. Rep. 576.

Upon an indictment for murder evidence was admitted to the effect that a short time before the killing the deceased had, at a meeting of the secret society of Good Templars, made threats against the prisoner, and said that he should stop selling liquor or lose his life, to show the character of the attack, the intention with which it was made, and that he had reasonable grounds to believe it necessary to go to the extent of taking his adversary's life. *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

In *Stokes v. People*, 53 N. Y. 174, evidence had been given making it a question for the jury whether the case was one of excusable homicide upon the ground that the accused killed the deceased in self-defense. It was held that evidence of violent threats against the life of the accused were admissible.

Grover, J., in this case thus lays down the reasons upon which this rule is founded: "Evidence of threats made by the deceased, which had been com-

municated to the accused, was received by the court. Proof of the latter facts was competent, as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when, in the absence of such threats, such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would show an attempt to execute them probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable, when not communicated, to the party threatened, as when they are so; and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats. Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it and the existence of this intention creates a probability that he has in fact committed it. Had the deceased, just previous to his going into the hotel where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree."

But in *State v. Bowser*, 42 La. Ann. 936, before prior acts, conduct, or threats of the deceased can be shown to excuse a homicide on the ground of self-defense, knowledge thereof by the defendant must be proved.

3. Threats against third persons.

a. By the defendant.

Generally, threats made by the defendant, to kill some person other than the deceased are not admissible. *Carr v. State*, 23 Neb. 749.

Threats against a particular person with whom the prisoner had had a quarrel are not admissible to show malice or intention to kill another person with whom, at the time, he had no quarrel, but whom, in a scuffle, he afterwards killed. *Abernethy v. Com.* 101 Pa. 328.

A threat of defendant to "get even" with a person whom he supposed to be the author of a libelous article but whom he afterwards found out was not, cannot be proved against him on a trial for killing another person, his ill feeling towards whom grew out of the same publication. *People v. Powell*, 11 L. R. A. 75, 87 Cal. 348.

But in *Palmer v. People* (Ill.) June 16, 1891, it was held that evidence that one accused of murder in killing an officer who was attempting to arrest him but previously stated that he expected arrest by another officer, and that he exhibited a deadly weapon and indicated his intention to use it in case such officer attempted to arrest him, is admissible to show his animus and a pre-meditated design to make resistance to the expected arrest.

Threats of an accused to kill several persons, including deceased, are not in-

admissible in evidence as being threats to kill others than deceased, where the theory of the state is that defendant and others had conspired together to kill all of those persons. *Slade v. State*, 29 Tex. App. 381.

On a trial for murder alleged to have been the result of a conspiracy, evidence of a threat made by the mob immediately after the homicide to kill another, and of their endeavors to execute such threat, was admissible as tending to show the desperate character of the conspiracy, and that murder was a part of its programme. *State v. McCahill*, 72 Iowa, 111.

Evidence of previous threats made by defendant against a railroad company is admissible on a trial for an assault upon one of its employes, upon the question of the motive and intent of the assailant. *Newton v. State*, 92 Ala. 33.

On a trial for homicide, evidence of a threat to kill the defendant, by a man whom the witness did not know to be the deceased except as he was informed by a bystander, is not admissible. *Hasson v. Com.* (Ky.) 10 Ky. L. Rep. 1054.

b. By the deceased.

Evidence of quarrelsome conduct and threats made by the deceased against a third party shortly before the killing is not admissible when not brought to the knowledge of the prisoner. *People v. Henderson*, 28 Cal. 465.

4. Threats by third persons.

A single isolated threat of a third party, unconnected with any other circumstance of the killing, is not admissible on a trial for homicide. *Woolfolk v. State*, 81 Ga. 551; *Holt v. State*, 9 Tex. App. 571.

On the trial of one for the murder of a woman, threats by the husband of the woman, made some time before, were held inadmissible, there being no evidence that the threats had been lately renewed or that the hostile feeling continued to the time of the killing. *Com. v. Abbott*, 130 Mass. 472.

Threats made by the brother of the accused against the deceased are inadmissible if the brother is not shown to have been indicted for the offense, and there is no evidence tending to show a conspiracy between the brothers as to the crime charged. *State v. Laque*, 41 La. Ann. 1070.

But threats by an accomplice of the defendant against the deceased because the latter was talking about his sister, are admissible because tending to show malice independent of the defendant, where the accomplice testified that he killed the deceased at the instigation of the defendant. *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95.

Threats of discharged employes against a railroad company are admissible in an action against it for personal injuries to a passenger by a wreck, in connection with evidence that the wreck was caused by a tie inserted in a frog in such a manner that it must have been placed there by human means; that there had been difficulty between the company and its employes; and that on the evening of the accident persons had been seen acting suspiciously on the tracks,—to show that the train had been wrecked by the intentional wrong doing of a third person. *Worth v. Chicago, M. & St. P. R. Co.* 51 Fed. Rep. 171.

5. General threats.

General threats made by the defendant on trial for murder, some time before the killing, are inadmissible in evidence, when defendant and deceased are shown to have been on friendly terms until the day of the homicide. *State v. Crabtree* (Mo.) July 1, 1892.

On a trial for murder a threat by the deceased, made the day before the murder, that he was going to win some money or kill some one, is not admissible where there is nothing to connect the threat with the defendant, although defendant shot him in a quarrel at a gaming table. *King v. State*, 89 Ala. 146.

But evidence of a threat made by deceased just before the killing, not directed to the defendants in terms but plainly referring to them, is admissible. *Sparks v. Com.* 89 Ky. 644.

And in *Whittaker v. Com.* (Ky.) 13 Ky. L. Rep. 504, it was held that general threats by defendant to kill someone on that day accompanied by an exhibition or reference to a knife and pistol, though inadmissible as part of the *res gestæ* of a homicide committed by him of which they formed no part, are competent to show general malice and a purpose to injure and kill someone.

And in *Hopkins v. Com.* 50 Pa. 9, 88 Am. Dec. 518, it was said not to be necessary that the victim should be selected. Threats of the prisoner within an hour before the stabbing that within twenty-four hours he would kill somebody are admissible as part of the *res gestæ*.

The bare fact that threats uttered by one charged with murder, in the course of the transaction in which the crime was committed, did not disclose the name of the party threatened, does not make proof of them immaterial or irrelevant. *State v. King*, 9 Mont. 445.

Evidence that defendant, charged with murder, was heard to make threats, "to kill a man before sundown," on the day of the murder, is admissible. *Hodge v. State*, 26 Fla. 11.

6. Effect of lapse of time.

The remoteness or nearness of time as to threats and declarations, pertaining to the act subsequently committed makes no difference as to the competency of the testimony. *Keener v. State*, 18 Ga. 194; *State v. Ford*, 3 Strobb. L. 517.

Evidence of threats made by a defendant on trial for murder against deceased four months previous to the killing is admissible. *Pate v. State* (Ala.) Jan. 8, 1892.

Threats against deceased made by defendant in a murder trial a month before the homicide are admissible upon the trial. *State v. Campbell*, 35 S. C. 28.

Threats made three years before are admissible to show malice on the part of one who has committed an assault. *Peterson v. Toner*, 80 Mich. 350. See also *Territory v. Roberts*, 9 Mont. 12; *Babcock v. People*, 13 Colo. 515.

But the weight to be given to evidence of previous threats made by the defendant depends upon their character, the occasion, nearness of time, and the particular circumstances surrounding the offense. *White v. Territory*, 3 Wash. Ter. 397; *People v. Brown*, 76 Cal. 573; *Cribbs v. State*, 86 Ala. 613; *State v. Glahn*, 97 Mo. 679; *Pate v. State* (Ala.) Jan. 8, 1892; *Griffin v. State*, 90 Ala. 599; *Long v. State*, 86 Ala. 43; *Barnes v. State*, 88 Ala. 204; *Evans v. State*, 62 Ala. 6.

The fact that six or eight months have elapsed since the threat, goes not to the admissibility, but to the weight to be given to the threat. *State v. Bradley* (Vt.) Aug. 25, 1892.

And the effect of lapse of time upon their weight is for the jury. *Cribbs v. State*, 86 Ala. 613.

On an indictment for assault with intent to murder, a conversation was held inadmissible between witness and the injured party on the evening before the

shooting, in which the injured party had said that he had intended to kill defendant,—“the d—d son of a whore,” though it appeared that witness had informed defendant of the insulting words, it not appearing that the shooting took place at the first meeting between the parties after defendant was so informed. *Howard v. State*, 23 Tex. App. 265.

The weight of authority establishes the doctrine that when a person being without fault and in a place where he has a right to be is violently assaulted, he may, without retreating, repel force by force and if, in the reasonable exercise of his right of self-defense, his assailant is killed he is justifiable. *Runyan v. State*, 57 Ind. 84, 26 Am. Rep. 52; 1 Bishop, Crim. L. § 865.

§ 364. **The Rule in Alabama.**—The Alabama decisions hold, that after the intention of killing of the deceased with a deadly weapon had been proved, the burden rested on the defendant to prove a pressing necessity on his part to take life in self-defense, unless this fact arises out of the question produced against him to prove the homicide. The *onus*, therefore, rests on the defendant, in such case, to show that he could not safely retreat without apparently increasing his peril. This must be so, for the inability to safely retreat is one of the elements of fact which enters into and creates the necessity to kill. *Carter v. State*, 82 Ala. 13. If there be a safe mode of successful retreat, there can be no necessity to kill, unless the appearances surrounding the defendant reasonably indicate the contrary. *Webster v. Com.* 5 Cush. 295, 52 Am. Dec. 711. The rule as to the *onus* of proof on this point is stated in accordance with the above view in *Cleveland v. State*, 86 Ala. 2, which is of later authority than *Brown v. State*, 83 Ala. 33, where the contrary rule seems to be asserted. We believe the doctrine of *Cleveland v. State* to be correct, and adhere to it. *Lewis v. State*, 88 Ala. 11.

The burden was on the state, however, to show that the defendants were in fault in bringing on, or provoking the difficulty,—not on the defendants to prove that they did not provoke it. *Brown v. State*, *supra*; *McDaniel v. State*, 76 Ala. 1.

§ 365. **Proof of Lying in Wait and Violent Temper.**—The accused has a right to prove that a man, then dead, had but a short time before the homicide, told him that the deceased had armed himself with a shotgun to kill him. This was not legal evidence of deceased arming himself to kill accused, but it was competent to prove that accused had so heard, and may have a

right so to believe; and to that extent and for that purpose, it was admissible. *Carico v. Com.* 7 Bush, 124.

The opinion in the case last cited announces a rule of conduct, which if generally observed, would ultimately result in utter prostration of criminal justice stripped of its verbiage. This ghastly proposition may be paraphrased as follows: It is argued that the deceased made violent threats against the life of defendant long before, and up to a short period of the killing, and that these threats coming to a knowledge of defendant, he had a right to kill the deceased on sight.—Let the murderer show communication to him of statements made by the victim, that would lead him to apprehend attempts against his life, and such evidence will justify an acquittal!

Judge Caruthers, in commenting upon this edifying proposition, says: "We have had one case before us in the last few years, in which the broad proposition stated in the first of the above extract, was charged as the law. But for this, and the indication that it has obtained to some limited extent in the legal profession, it would scarcely be deemed necessary to notice it. There is no authority for such a position. It would be monstrous. No court should for a moment entertain or countenance it. The criminal code of no country ever has, nor, as we presume, ever will, give place to so bloody a principle."

"The threats of even a desperate man, do not, and ought not, to authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony, justify a measure so extreme. But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if, on such an occasion, he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than

to kill him, he is obliged to wait until he is actually assailed. He may not hunt his enemy and shoot him down like a wild beast; nor has he the right to bring about an unnecessary meeting in order to have a pretext to slay him; but neither reason nor the law demands that he shall give up his business and 'abandon society to avoid such meeting.' "

Upon the trial of an indictment for murder in the first degree, where the homicide is proved and the evidence discloses no circumstances indicating that it was committed under the influence of provocation at the time, or sudden anger, but it appears the act was done with premeditation, and deliberation, evidence that the prisoner had an irascible temper, or was subject to fits of passion from slight causes is incompetent.

So also evidence is incompetent that the conduct of the prisoner for a period prior to the homicide was characterized by eccentricities and peculiarities causing criticism with reference to his mental capacity, where the evidence is not offered for the purpose of proving insanity, but solely as bearing upon the question of intent, deliberation and premeditation. *Sindram v. People*, 88 N. Y. 196; Whart. & S. Medical Jurisprudence, §§ 307, 692.

After evidence has been given tending to show that a homicide was committed in self-defense, defendant can follow it by proof of general reputation of quarrelsomeness and violence of the deceased, but cannot give in evidence specific acts of deceased of violence towards third persons or of cruelty to domestic animals. *People v. Druse*, 5 N. Y. Crim. Rep. 10.

The question of the admissibility of the evidence of the general character of the deceased, is one of great doubt. The question first came up before the New York court of appeals in *People v. Lamb*, 2 Keyes, 371.

The prisoner in that case had been convicted of the murder of his wife. The defense seems to have been that the murder was committed in self-defense. The particular violence alleged against the deceased was that she threw the cover of an iron pot at her husband. The general term reversed the conviction. Evidence of the general character of accused, was in that case rejected, and the general term probably gave such refusal as a reason for the reversal of the conviction. In the court of appeals, *Judge Davies*, in an elaborate opinion, held the rejection of the evidence right, but the judgment of reversal was affirmed by a majority of the court on different grounds.

In *Eggler v. People*, 56 N. Y. 642, there was also a conviction for murder. In this case, at the trial, proof of the general character of the deceased for violence was received. The prisoner offered to show specific acts of violence in addition, which offer was rejected, and the court of appeals held the rejection right. In *Blake v. People*, 73 N. Y. 586, also a case of murder, the prisoner, by the cross-examination of one of the witnesses for the people, sought to prove that the deceased was a quarrelsome and dangerous man. The court refused to receive the testimony at that time. It was held by the court of appeals that the court committed no error in rejecting the evidence in that way; "it being the introduction of a new subject as matter of defense, it was simply a question as to the order of proof, which was in the discretion of the court." While thus, it will be seen, that is no direct decision upon the question, the weight of authorities seem to call for the admission of the testimony in this case. In *People v. Lamb*, 2 Keyes, 371, Judge Davies recognizes an exception to the general rule that the character of the deceased is not a question to be raised upon trials for murder. There is no right given to kill any man because of his character. When, however, the character of the deceased is a material part to be considered in determining the guilt of the accused, it is to be received like other facts; and if such evidence is rejected improperly, then it furnishes a case where all the evidence was not before the jury, and an improper rejection of evidence is ground for reversal. *People v. Stokes*, 53 N. Y. 164. The prisoner has the right to have all competent evidence in his favor considered, and its rejection cannot be overlooked. In *People v. Lamb, supra*, Judge Davies classes among the exceptions to the general rule that the character of deceased is not a subject of inquiry, cases where the assault was first commenced by deceased, and the claim of the prisoner is that the killing was in self-defense.

It may be stated as the general rule sustained by several recent decisions and founded on manifest justice, that in trials for homicide or in cases of aggravated assault, for the accused to show the hectoring disposition of the deceased, his tendency to brawls, his great muscular strength, and his violent demeanor, especially when under the influence of liquor.

It must further appear that these characteristics were known to the accused at the time of the affray, such evidence being the case

it is an important circumstance from which the jury may determine the nature of the assault, and the course of treatment the accused had reason to expect from his assailant. *State v. Collins*, 32 Iowa, 36; *State v. Keene*, 50 Mo. 357; *Hurd v. People*, 25 Mich. 405.

§ 366. **Vacillation in the Authorities.**—A critical examination of the reports will disclose great vacillation as to the admissibility of this species of evidence. The question is one of great importance, and of constantly recurring interest in criminal proceedings. The supreme court of Missouri, through Wagner, *J.*, who wrote for reversal, has influenced this phase of our subject by a very able opinion, which will illustrate the tendency of the American judiciary on this subject. I subjoin the opinion entire.

§ 367. **Pertinent Illustration of a Missouri Case.**—"The defendant was indicted for killing one Evans. It seems that the defendant had been on terms of amity and good will with Evans till the day before the killing took place. On that day, they met at the house of a friend, together with other company, when the defendant treated Evans with friendship and civility. But Evans had ascertained that the defendant was engaged to be married to a niece of his wife, and was greatly enraged about it, and instead of returning the kind treatment of the defendant, he violently assaulted him with a pistol and knife, and swore that he would kill him, nothing but his blood would satisfy him.

"Through the intercession of friends, he was kept from carrying out his purpose; but the defendant, in order to save himself from violence and death, was obliged to make his escape from a back door. After this occurrence, Evans renewed his threats—declared that he would make no compromise in reference to the matter—that he would kill defendant on sight, if it was the last act of his life. These threats were communicated to the defendant the same evening.

"It further appears that on the morning of the occurrence above referred to, Evans hallooed to the defendant, saying to him that he was a 'damned cowardly son of a bitch, and that if he would come up there he would thrash hell out of him, and that he intended to kill him if he married his niece.' The only answer defendant made to his abuse, was to ask Evans what he wanted to kill him for. On his arrival at home, defendant went to his stable to put his horse up, and whilst he was still at his stable,

Evans rode up. Evans went into a store across the street from the stable. Defendant wanted to go into the store, but he was warned not to do so, as he would be in danger of his life if he met Evans. Defendant then stayed in the stable, and sent friends to have an interview with Evans, for the purpose of trying to arrange the difficulty. But Evans was obdurate; he would abate nothing of his hatred and his desire for blood, and the life of defendant only would satisfy him. Evans then came out on the street, and was in fierce altercation with the persons around him, when the defendant fired the shot from which he afterward died.

“At the trial, the court excluded all evidence of what occurred on the day previous to the killing, and the threats made by the deceased in reference to his intention to kill the defendant. In this, the court unquestionably erred. This whole transaction, and all the matters connected with the difficulty, are so nearly allied that it is impossible to separate them. From the inception to the fatal consummation, less than twenty-four hours intervened. The threats continued down, uninterruptedly, and were all nearly coeval with the killing, and they were all brought home to the knowledge of the party who did the slaying. They constituted the chain of one continued hostile series of facts by the deceased, down to the time he was shot. That they had created a dread in the breast of the defendant, that he was in danger of losing his life, there can be no doubt, that the evidence was admissible to show the reasonableness of his fears.” *State v. Sloan*, 47 Mo. 604.

§ 368. **Views of the Virginia Court.**—There are comparatively few reported cases that contain such abundant *dicta* upon this subject of threats or antecedent grudge, as a well considered case decided by the supreme court of appeals of Virginia in 1872. The decision was by a divided court, which will the better indicate the obscurity with which this subject is still shrouded. The importance of the topic, and the discord in the rulings, induce an extended quotation from the opinion in what is now well recognized as a celebrated criminal case. *Read v. Com.* 22 Gratt. 924. “Words alone, however insulting or contemptuous, are never a sufficient provocation to have that effect, at least where a deadly weapon is used; so tender is the law of human life, and so much opposed is it to the use of such a weapon.

“It is not only necessary in such a case and for such an effect that a reasonable provocation should be received, but it is also

necessary that the provocation should have the effect of producing sudden passion under the influence of which alone the offense is committed. It must be a sudden transport of passion, which the law calls *furor brevis*. If a person on receiving the gravest provocation is unmoved by passion, but wantonly and wilfully and wickedly kills his adversary otherwise than in self-defense, he is guilty of murder. The law mitigates the offense to manslaughter only as an indulgence to the infirmity of human nature. Provocation without passion, or passion without provocation, will not do; both must concur to reduce the offense to the grade of manslaughter.

“Again, if an unlawful homicide be committed in pursuance of a preconceived purpose, the offense will be murder, no matter how great a sudden provocation may have immediately preceded the act. The provocation may have been brought about or sought by the perpetrator, or he may have availed himself of it to give color of justification or excuse to his act, done in execution of his deliberate purpose. It is true that where there is both an old grudge and fresh provocation, the jury ought rather to presume, in the absence of sufficient evidence to the contrary, that the homicide was induced by the fresh provocation, and not by the old grudge. But then this is a matter for the jury on all the evidence before it, and there is generally sufficient evidence in every such case to satisfy the jury beyond a doubt which one of these two concurring motives induced the act.

“But, in this case, there was abundant evidence of an antecedent grudge and previous threats, and preparation for the commission of the act. Merriman has lost a twenty-dollar note, and suspected the prisoner of stealing it. The prisoner asked for time to show his innocence, and repeated the request from time to time, which Merriman as often granted him. At length the prisoner having given him an account which was not satisfactory, he charged the prisoner with the theft. Witness then said that Merriman must take back the charge or he would shoot him. Merriman replied, “Shoot then, if you choose, I will not take it back.” This threat of the prisoner and this reply of Merriman were repeated as many as five different times. Now, although both the prisoner and Merriman drank freely on the day of the commission of the act, and were under the influence of spirits at that time, yet it does not appear, and it is not probable, that they were under

such influence on the former occasion when the threat was made. The prisoner prepared himself with a deadly weapon, which he carried secretly about his person. It does not appear that he had been in the habit of carrying such a weapon, and as it is unlawful to do so habitually, the jury might well have presumed that he provided himself with the weapon for the special purpose of executing his threat, unless he could intimidate Merriman to retract the charge he had made against him. These acts, connected with the actual shooting which followed, and the circumstances under which it was done, strongly tend to show that the act was deliberately done in execution of his prior threats that he would do precisely what he did do."

The inaccurate dictum of the minority report in this ably reasoned case had the effect for a time of weakening its influence as a rule of criminal law but time has failed to impair the logic of its conclusions and it has met with the suggestive approval of "silent acquiescence."

§ 369. **What is Reasonable Cooling Time.**—As already intimated, the question of the reasonableness of adequacy of the provocation must depend upon the facts of each particular case. That can, with no propriety, be called a rule (or a question) of law which must vary with and depend upon the almost infinite variety of facts presented by the various cases as they arise. See *Stark. Ev.* (Am. ed. 1860) 676–680. The law cannot, with justice, assume, by the light of past decisions, to catalogue all the various facts and combinations of fact which shall be held to constitute reasonable or adequate provocation. Scarcely two past cases can be found which are identical in all their circumstances, and there is no reason to hope for greater uniformity in future. Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents.

The same principles which govern, as to the extent to which the passions must be excited and reason disturbed, apply with equal force to the time during which its continuance may be recognized as a ground for mitigating the homicide to the degree of manslaughter, or in other words, to the question of cooling time. This, like the provocation itself, must depend upon the nature of the case.

In *Rex v. Hayward*, 6 Car. & P. 157, and *Rex v. Lynch*, 5 Car. & P. 324, this question of reasonable cooling time was ex-

pressly held to be a question of fact for the jury. And see Whart. Am. Crim. L. (4th ed.) § 990, and cases cited. I am aware there are many cases in which it has been held a question of law; but I can see no principle on which such a rule can rest.

Directly the opposite is laid down as the rule in 1 Russell, Crimes, pp. 524, 525, where it is said, "whether the blood has had time to cool or not is a question for the court and not for the jury." And in 2 Starkie, Evidence, pp. 947, 948, in speaking of the circumstances of "necessity, accident or infirmity," which justify, excuse or extenuate the act, the author uses the following language: "It is for the jury to pronounce upon the truth of such facts, and it is for the court to decide whether in point of law the fact of killing is justified, excused or alleviated by these facts."

There is no evidence of any time for passion to cool. *Leighton v. People*, 88 N. Y. 117; Roscoe, Crim. Ev. 685.

The prisoner may, in certain instances, extenuate his crime and reduce it from murder to manslaughter, by proof that the act was committed during the transport of passion and resentment, excited by sudden provocation, which for the time subdued his reason. For such evidence repels the inference of that deliberate malice and malignity of heart, which is essential to the offense (of murder). What degree of provocation and under what circumstances, heat of blood, the *furor brevis* will or will not avail the defendant, is usually a question of law, arising upon the special facts of the case. Roscoe, Crim. Ev. 964.

It is the nature of the provocation and not the mere effect of it on the mind of the prisoner, which the law regards, and the sufficiency of the provocation to extenuate the prisoner's guilt, is a question of law. If one killed another immediately upon a grave and serious provocation, likely to excite great passion, the offense will amount to no more than manslaughter, although the defendant used a deadly weapon. Roscoe, Crim. Ev. 965.

Where, after mutual combat, a question arises whether there has been time for excited passions to subside, the question always takes this form; whether there had been sufficient time to cool, and not whether, in point of fact, the defendant did remain in a state of anger. *People v. Sullivan*, 7 N. Y. 400. The rationale of this entire matter would seem to lie within a very small compass.

In *Ferguson v. State*, 49 Ind. 33, 35, Pettit, *J.*, said: "All elementary authority and adjudicated cases agree that time must be given for the passion of the injured person to become calm; and many authorities say that the question ought to be submitted to the jury as to whether the passion of the injured person had been actually quieted. If we suspend our discussion of the principles which ought to be applied to the question, and pass to the consideration of the decided cases as found in other jurisdictions, we shall find the ruling of the court vindicated, not simply by the preponderance of judicial authority, but by absolute unanimity."

§ 370. **Extended Collation of Authority.**—Where the evidence raises a doubt as to who was the aggressor at the time of the homicide—the deceased or the accused, and it further appears that the threats had not been communicated to the defendant, evidence of their nature and character is admissible. *Roberts v. State*, 68 Ala. 156; *Harris v. State*, 34 Ark. 469; *Palmore v. State*, 29 Ark. 248; *People v. Travis*, 56 Cal. 251; *People v. Alivtree*, 55 Cal. 263; *People v. Scoggins*, 37 Cal. 676; *White v. Territory*, 3 Wash. Ter. 397; *West v. State*, 2 Tex. App. 460; *Powell v. State*, 19 Ala. 577; *Logan v. State*, 17 Tex. App. 50; *Pitman v. State*, 22 Ark. 354; *Wilson v. State*, 18 Tex. App. 576; *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Hughey v. State*, 47 Ala. 97; *Davidson v. People*, 4 Colo. 145; *Howard v. State*, 23 Tex. App. 265; *Coker v. State*, 20 Ark. 53; *Atkins v. State*, 16 Ark. 568; *Green v. State*, 69 Ala. 6; *Lingo v. State*, 29 Ga. 470; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941; *Pridgen v. State*, 31 Tex. 420; *Fitzhugh v. State*, 13 Lea, 258; *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *West v. State*, 18 Tex. App. 640; *Allen v. State*, 17 Tex. App. 637; *Mayfield v. State*, 110 Ind. 591; *State v. Brown*, 22 Kan. 222; *Hart v. Com.* 85 Ky. 77; *State v. McNally*, 87 Mo. 644; *State v. Rider*, 90 Mo. 54; *Holler v. State*, 37 Ind. 57, 10 Am. Rep. 74; *State v. Jackson*, 37 La. Ann. 896; *Little v. State*, 6 Baxt. 491; *State v. Turpin*, 77 N. C. 473; *State v. Janvier*, 37 La. Ann. 645; *Harris v. State*, 47 Miss. 318; *Edwards v. State*, 47 Miss. 581; *State v. Labuzan*, 37 La. Ann. 489; *State v. Dumphrey*, 4 Minn. 438; *State v. Ryan*, 30 La. Ann. 1176; *Newcomb v. State*, 37 Miss. 383; *Binfield v. State*, 15 Neb. 484; *State v. Fisher*, 33 La. Ann. 1344; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *State v. Stewart*, 9 Nev. 120; *State v.*

Ferguson, 9 Nev. 106; *State v. Hall*, 9 Nev. 58; *State v. Williams*, 40 La. Ann. 168; *State v. Downs*, 91 Mo. 19; *Turpin v. State*, 55 Md. 462; *Thomason v. Territory*, 4 New Mex. 150.

In reviewing these decisions it is surprising to find that a rule of conduct so satisfactory and apparently so obvious should ever have been a subject of judicial controversy. The principle received its first expansion in the reports of *Chief Justice* Hobart in the time of James I., while the conclusions reached by that distinguished peer were reaffirmed by *Lord Chancellor* Nottingham and thus given an abiding place in the English common law. See also the reports of *Lord Chief Baron* Comyns on the same subject.

For the English law of self-defense, see Stephen's Digest of Criminal Law, art. 200, where the law in England is given, together with criticism of some well known cases from Hale and Hawkins. This article is too long to be here given in full, but is worthy of attentive reading.

CHAPTER XLV.

EVIDENCE OF CHARACTER.

- § 371. *Statement of the Present Rule.*
- 372. *Record Evidence of Bad Character how Rebutted.*
- 373. *What Evidence of Character may Show.*
- 374. *Always Available when Evidence is Circumstantial.*
- 375. *The Cases Examined.*
- 376. *When Evidence is Confined to General Reputation.*
- 377. *The English Rule Examined.*
- 378. *When Evidence of Good Character is Unavailing.*
- 379. *The Rule Restated.*
- 380. *When Negative Evidence of Character is Competent.*

§ 371. **Statement of the Present Rule.**—In regard to the admissibility of evidence of character, there has been some fluctuation of opinion. The better rule now seems to be, that in all cases of a direct prosecution for a crime, evidence of the general good character of the accused is admissible, as in those cases where the guilty knowledge or criminal intention is of the essence of the offense. But where a penalty is claimed for the mere act, irrespective of the intention, evidence of character is not admissible. No evidence of the general character of the person on whom the offense was committed, is, in general, admissible, the character being no part of the *res gestæ*. An exception to this rule is, however, made in prosecutions for rape. And in cases of homicide, it is admissible to show, in his favor, expressions of good will and acts of kindness on the part of the prisoner towards the deceased. Haines, Justices of Peace, p. 688, citing Greenl. Ev. §§ 26, 27.

No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false, or the witnesses mistaken.

Evidence of this nature is not a mere make-weight thrown into a case to assist in the production of a result that would happen at

all events, but it is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal. *Weston v. Com.* 111 Pa. 251. And it must be considered that, in criminal trials, it is always proper to prove the previous good character of the accused, in order to show that it was unlikely that such a person would have perpetrated the crime, and this notwithstanding his good character is presumed until it is impeached. His character is attacked by the charge against him. But this rule is elementary. *Hardtke v. State*, 67 Wis. 552; *Whart. Crim. Ev.* § 58.

But, in weighing evidence of good character, a jury should be careful to remember that all men at some time in their lives have been men of good character, and that men of previous good character have been known to commit some of the gravest crimes known to the law. However, the law, in its humanity, says that evidence is to be received and considered by the jury, and given all the weight that they think it justly and properly entitled to, and no more.

It is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character. *Com. v. Webster*, 5 Cush. 325, 52 Am. Dec. 711; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

§ 372. **Record Evidence of Bad Character how Rebutted.**—Among the stereotyped questions propounded to a witness with a view to impair his credit is this, "Were you ever arrested and convicted of such a crime?" (naming the crime). In the vast majority of instances the interlocutor has previous knowledge of the facts and the reply elicited is almost invariably in the affirmative. This naturally creates unfavorable presumptions. It is a matter of no small importance to the criminal bar of this country to know that relief may be afforded in part at least from these unfavorable impressions by eliciting upon the re-direct examination testimony from the witness declaratory of his innocence of the crime charged and this although the record of his conviction be produced. Such a record is not conclusive of a person's guilt (*Sims v. Sims*, 75 N. Y. 467), and the witness has the right to show his innocence and relieve himself from the stigma of conviction. *Wolkoff v. Tefft*, 35 N. Y. S. R. 93.

The record of the judgment or conviction may under some circumstances be received in civil actions as *prima facie* evidence of

the fact of guilt, but never as conclusive or as estopping the party convicted from proving his innocence.

One strong reason assigned for not holding such records conclusive is the absence of any mutuality in the estoppel. The confusion which is sometimes perceptible in the cases on this subject, results from losing sight of the distinction between the purposes for which such judgments are offered, whether as evidence of the fact of conviction and judgment, or of the fact of the guilt of the party. Such a judgment is conclusive for the purpose of establishing the fact that it has been rendered, and all the legal consequences which flow from it.

Therefore when by law the fact of conviction disqualifies a witness, the record, when introduced for that purpose, is unimpeachable and the evidence is for the court and not the jury. When offered for the purpose of establishing the fact of guilt there is a great weight of authority for the proposition that it is not admissible in a civil case, but it is well settled that if admitted it is only prima facie evidence. *Sims v. Sims*, 75 N. Y. 466.

§ 373. **What Evidence of Character may Show.**—Such evidence might create a reasonable doubt in favor of the accused. *Armor v. State*, 63 Ala. 173; *Carson v. State*, 50 Ala. 134; *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771; *Hall v. State*, 40 Ala. 698; *Jupitz v. People*, 34 Ill. 516; *People v. Ashe*, 44 Cal. 288; *People v. Fenwick*, 45 Cal. 287; *People v. Raina*, 45 Cal. 292; *State v. Gustafson*, 50 Iowa, 194; *State v. Lindley*, 51 Iowa, 343, 33 Am. Rep. 139; *State v. Donovan*, 61 Iowa, 278; *State v. McMurphy*, 52 Mo. 251; *People v. Lamb*, 2 Keyes, 360; *Stover v. People*, 56 N. Y. 315; *State v. Henry*, 50 N. C. 65; *Heine v. Com.* 91 Pa. 145; *Lee v. State*, 2 Tex. App. 338; *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694. Or it may be produced to rebut the presumption arising from facts and circumstances. *State v. Ford*, 3 Strobb. L. 517, note; *State v. Rodman*, 62 Iowa, 456.

But the failure of the accused to call witnesses as to his character raises no presumption of bad character. *State v. Dockstader*, 42 Iowa, 436; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Harrington v. State*, 19 Ohio St. 264; *Ormsby v. People*, 53 N. Y. 472; *People v. Bodine*, 1 Denio, 282; *State v. O'Neal*, 29 N. C. 251.

Where evidence of good character has been interposed, it may be rebutted by evidence of bad character deduced from his own

admissions, but not by proof of particular acts. *Smith v. State*, 47 Ala. 540; *McCarty v. People*, 51 Ill. 231, 99 Am. Dec. 542; *Gordon v. State*, 3 Iowa, 410; *State v. Williams*, 77 Mo. 310.

The principle upon which good character may be proved is, that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule, that a person who has uniformly pursued an honest and upright course of conduct will deflect from it and perform acts inconsistent with such a course. Such a person may be overcome by temptation and fall into crime, but the general rule is fortunately otherwise. The influence of this presumption from character will necessarily vary according to the varying circumstances of different cases. It must be slight when the accusation of crime is supported by the positive testimony of unimpeached witnesses; and it will seldom avail to control the mind in cases where the testimony, though circumstantial, is reliable, strong and clear. But in cases where the other evidence in the case is nearly balanced, but slightly preponderating against the defendant, the presumption from proof of good character should determine the result and work an acquittal.

Neither good nor bad character can be proved by specific acts or charges. *Smith v. State*, *McCarty v. People*, and *Gordon v. State*, *supra*; *Engleman v. State*, 2 Ind. 91; *People v. White*, 14 Wend. 111.

Where a person is charged with a crime, the failure to call witnesses to prove his general good character raises no presumption against it. *State v. Kabrich*, 39 Iowa, 277; *State v. O'Neal*, 29 N. C. 251; *People v. Bodine*, 1 Denio, 282; *People v. White*, 24 Wend. 520; *State v. Dockstader*, 42 Iowa, 436.

§ 374. Always Available when Evidence is Circumstantial.

—Good character always is in favor of the prisoner against whom the proof is circumstantial. When there is direct evidence of the commission of a crime by a prisoner, then good character goes for naught; when the proof is circumstantial, proof of good character is a matter to be taken into consideration, and is to have a very favorable influence upon the mind of the jury. Good character of the accused is to be considered by the jury upon the question of the credibility of direct evidence of his guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances. *Remsen v. People*, 43 N. Y. 6; *Stover v. People*, 56 N. Y. 315.

Indeed, in a close or doubtful case, great weight should be attached to evidence of good character. *People v. Lamb*, 2 Keyes, 360; 2 Abb. Pr. N. S. 148; *Cancemi v. People*, 16 N. Y. 501.

The weight of modern authority seems to be overwhelmingly in favor of the rule that proof of good character constitutes an ingredient to be considered by the jury, in all criminal cases, without reference to the apparently conclusive or inconclusive character of the other evidence. See *State v. Henry*, 50 N. C. 65; *Rex v. Stannard*, 7 Car. & P. 673; *Kistler v. State*, 54 Ind. 400; 1 Whart. Am. Crim. L. (7th ed.) 644.

§ 375. **The Cases Examined.**—In *Com. v. Hardy*, 2 Mass. 303, it was said that “in doubtful cases, a good general character, clearly established, ought to have weight with a jury, but it ought not to prevail against the positive testimony of credible witnesses,” and in *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, a distinction was taken between crimes “of great and atrocious criminality” and “smaller offenses,” and it was said that “against facts strongly proved good character cannot avail,” and that in the smaller offenses, such as “pilfering and stealing, where the evidence is doubtful, . . . proof of character may be given with good effect.”

If evidence of reputation is admissible at all, its weight should be left to be determined by the jury in connection with all the other evidence in the case.

It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.

“Evidence of good character is always admissible for the defendant in a criminal case; it is to be weighed and considered in connection with all the other evidence in the cause,—it may of itself, in some instances, create the reasonable doubt which would entitle the accused to an acquittal. The rule itself is not merely merciful. It is both reasonable and just. There may be cases in which, owing to the peculiar circumstances in which a man is placed, evidence of good character may be all he can offer in answer to a charge of crime. Of what avail is a good character, which a man may have been a lifetime in acquiring, if it is to benefit him nothing in his hour of peril?” Paxson, *Ch. J.*, in *Com. v. Cleary*, 8 L. R. A. 301, 135 Pa. 64.

In *Stephens v. People*, 4 Park. Crim. Rep. 396, and *Lowenberg v. People*, 5 Park. Crim. Rep. 414, the jury was instructed that good character might raise the doubt entitling the prisoner to an acquittal, and the weight to be given thereto was for the jury in each case. The defendant having been found guilty in each case, no point was raised, as we understand, in the appellate court as to the validity of the instructions.

The doctrine announced in *Com. v. Webster*, *supra*, has been disapproved and condemned in *Cancemi v. People*, 16 N. Y. 501; *People v. Ashe*, 44 Cal. 288; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Harrington v. State*, 19 Ohio St. 264. The rule of these cases is sustained by *State v. Henry*, 50 N. C. 65; *Jupitz v. People*, 34 Ill. 516; *State v. McMurphy*, 52 Mo. 251; *United States v. Whitaker*, 6 McLean, 342; *Com. v. Carey*, 2 Brewst. 404; *Epps v. State*, 19 Ga. 102; *Felix v. State*, 18 Ala. 720; *Carson v. State*, 50 Ala. 134; *Ryan v. People*, 19 Abb. Pr. 232.

In *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62, it is in substance said that good character is no defense, and the better course is to submit the question as to its effect to the jury; but it would be going too far to lay it down as a fixed rule that it is sufficient to raise a reasonable doubt.

This question was somewhat considered in *State v. Turner*, 19 Iowa, 144. The opinion is exceedingly brief, consisting of but a few lines so far as this point is concerned, and while it may not be clear and certain, yet we think the only rule established is "that in all cases a good character is to be considered."

Of course, if the respondent sees fit to put his character in issue by offering evidence tending to show that it is good, it is then permitted to the prosecution to rebut this testimony by showing that it is bad, but the weight of authority is to the effect that this must be done by evidence, not of particular facts, but of reputation. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue

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presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge. *Peterson v. Morgan*, 116 Mass. 350.

In a case heard before all the judges in England, it was held that, if evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation and the individual opinion of the witnesses as to his disposition, founded on his own experience and observation, is inadmissible. *Chief Justice Cockburn*, in delivering the opinion of the court, says: "The only way of getting at it (his character) is by giving evidence of his general character founded on his general reputation in the neighborhood in which he lives." "It is quite clear that, as the law now stands, the prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors. So, too, evidence of antecedent bad conduct would form equally good ground for inferring the prisoner's guilt, yet it is quite clear evidence of that kind is inadmissible." Again, in speaking of the limits of rebutting evidence, where the prisoner puts in evidence of good character, he says: "I think that that evidence must be of the same character and confined within the same limits,—that as a prisoner he can only give evidence of a general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given in favor of the prisoner is not true, but that the man's general reputation is bad." The judges who dissented admitted that evidence of particular facts was admissible, but were of opinion that the testimony of a witness founded on his own experience and observation went to show disposition and was therefore admissible on the question of character. *Chief Justice Erle* said: "I agree that evidence of individual facts is to be excluded; but whether the answer given by the witness in this case is in the nature of an individual fact or not I do not stop to inquire, because a question of very general importance has been raised, and, with reference to that question, I am of opinion that the answer, understood as evidence of disposition, is admissible." *Reg. v. Rowton*, Leigh & C. 520, 10 Cox, C. C. 25.

There can be no doubt that when a witness is put upon the stand to attack or defend character, he can only be asked on the examination in chief as to the general character of the person whose character is in question, and he will not be permitted to testify to particular facts, either favorable or unfavorable to such person, but when the witness is subjected to cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. In the eye of the law the character of a person is to be ascertained by an inquiry as to what is generally said or thought of him in the community where he resides. Hence when a witness has testified on his examination in chief that the person, as to whose character the inquiry is instituted, bears a good character, his opinion and the value of it may be tested by asking the witness on his cross-examination whether he has ever heard that the person, whose character is in question, has been accused of doing acts wholly inconsistent with the character which he has attributed to him. *State v. Merriman*, 34 S. C. 16.

"There are cases of circumstantial evidence," says *Chief Justice Shaw*, "where the testimony adduced for and against a prisoner is nearly balanced, in which a good character would be very important to a man's defense. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crimes. He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offenses, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a higher character for honesty would satisfy a jury that he would not be likely to yield to such a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But

still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character." *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711; *Trial of Prof. Webster* (Bemis' ed.) 495, 496. See *State v. Turner*, 19 Iowa, 144.

§ 376. When Evidence is Confined to General Reputation.

—It has often been held that, on direct examination, the evidence must be confined to general reputation; and that no evidence is allowed of particular acts of good or bad conduct, either to sustain or impeach character. *Jones v. State*, 76 Ala. 9; *Hussey v. State*, 87 Ala. 121. To thoroughly comprehend the scope of this rule, we must understand the reasons upon which it is founded, which are the following: (1) Every person is supposed to be capable at any time of sustaining his general reputation; but it would be unreasonable to expect any one to be prepared, without special notice, to answer an assault on his character imputed by particular acts of bad conduct. (2) To allow such evidence, moreover, would lead to the mischief of raising any number of collateral issues, the trial of which might be almost interminable, and otherwise objectionable as diverting the mind of the jury from the main issue. 2 Taylor, Ev. (7th Eng. ed.) § 470.

While particular acts of bad conduct are not admissible to assail character on the direct examination, a witness deposing to general character may be cross-examined as to the particular facts, in order to test the soundness of his opinion, and elicit the data on which it was founded. *Jackson v. State*, 78 Ala. 471; *Steele v. State*, 83 Ala. 20. The same is said generally by the text-writers on the laws of evidence. 1 Taylor, Ev. § 352; 2 Stark. Ev. 304. By this is meant, not the truth of such particular facts, but circulating rumors of them, which form a part of the general repute, and help to make up one's good or bad character. This principle is

illustrated by the old case of *Reg. v. Wood*, 5 Jur. 225, where a witness for a defendant who was charged with highway robbery, having testified to his good character, was asked on cross-examination whether he had not heard that the prisoner was suspected of having committed a robbery in the neighborhood of a few years before. It was objected, that this was a particular fact raising a collateral issue. The objection was overruled by Baron Parke, who observed: "The question is not, whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."

§ 377. **The English Rule Examined.**—The English rule in reference to this subject has been epitomized by Sir James Stephen in the following language: "In criminal proceedings, the fact that the person accused has a good character, is relevant; but the fact that he has a bad character, . . . is irrelevant. In this article the word 'character' means reputation as distinguished from disposition, and evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown." Stephen, Dig. art. 56.

"When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offense was committed was of a general immoral character, although she is not cross-examined on the subject. The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted. She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she (probably) may be contradicted." Stephen, Dig. (Chase's ed.) art. 134.

Mr. Chase in a valuable note appended to the article above quoted says: "The cases in this country are agreed that the woman's bad general character for chastity may be proved by witnesses, and also that she may be examined as to her previous connection with the prisoner. 3 Greenl. Ev. § 214; *Conkey v. People*, 1 Abb. App. Dec. 418; *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309; *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132, and cases *infra*. But they disagree as to whether particular acts of connection with other men can be proved. In many states the right to prove such acts is denied, either by her own examination or by the

evidence of witnesses (*Com. v. Harris*, 131 Mass. 336; *State v. Forshner*, *supra*; *McCombs v. State*, 8 Ohio St. 643; *Richie v. State*, 58 Ind. 355; *State v. White*, 35 Mo. 500; *State v. Turner*, 1 Houst. Crim. Rep. 76) but in some states such proof is competent (*State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337, permitting it by cross-examination; *Benstine v. State*, 2 Lea, 169, 31 Am. Rep. 593; holding both modes of proof allowable, and so *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *Strang v. People*, 24 Mich. 1). In New York the decisions are conflicting (*Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309) but in a civil action for assault with intent to ravish, such evidence has been received in mitigation of damages. *Gulerette v. McKinley*, 27 Hun, 320; *Watry v. Ferber*, 18 Wis. 501, 86 Am. Dec. 789.

"In actions of seduction, the woman's bad character for chastity may be shown (see art. 57, *note, ante*), but she cannot be cross-examined as to acts of intercourse with other men than the seducer (*Hoffman v. Kemmerer*, 44 Pa. 453; *Doyle v. Jessup*, 29 Ill. 460; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232, but see *Wandell v. Edwards*, 25 Hun, 498; *South Bend v. Hardy*, 98 Ind. 577) unless a child is born and its paternity is in question. See *Smith v. Yaryan*, *supra*. But some cases hold that such acts may be proved by the testimony of the men themselves." 2 Greenl. Ev. § 577; *Ford v. Jones*, 62 Barb. 484; *White v. Murland*, 71 Ill. 250, 22 Am. Rep. 100.

In a prosecution for rape, the character of the woman for chastity is involved in the issue, and may be impeached by general evidence of her reputation, but particular instances of criminal connection with other persons than the defendant are inadmissible. *Com. v. Regan*, 105 Mass. 593; *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

§ 378. **When Evidence of Good Character is Unavailing.**—Where, however, the act charged in the indictment is *malum in se*, and the evidence clearly sustains it, and there is an entire absence of justifying circumstances or extenuating facts, proof of good character is wholly incompetent and irrelevant, as it has no tendency to either prove or disprove any issue raised by the indictment and evidence of this nature, if offered, should be wholly disregarded. *Coleman v. State*, 59 Miss. 484; *Com. v. Hardy*, 2 Mass. 317; *State v. McMurphy*, 52 Mo. 251; *McDaniel v. State*, 8 Smedes & M. 401; *People v. Bell*, 49 Cal. 488; *Wesley v. State*,

37 Miss. 331, 75 Am. Dec. 62; *State v. Northup*, 48 Iowa, 583, 30 Am. Rep. 408; *United States v. Smith*, 2 Bond, 323; *Bennett v. State*, 8 Humph. 118; *United States v. Roudenbush*, Baldw. 514; *Rex v. Davison*, 31 How. St. Tr. 217; *United States v. Freeman*, 4 Mason, 510; *People v. Kirby*, 1 Wheel. Crim. Cas. 64; *People v. Vane*, 12 Wend. 82; *State v. Pearce*, 15 Nev. 191; *State v. Brown* (note) 3 Strobbh. L. 527; *State v. Gleason*, 1 Nev. 173; *State v. Wells*, 1 N. J. L. 628; *People v. Josephs*, 7 Cal. 129; *People v. Cole*, 4 Park. Crim. Rep. 35; *People v. Roberts*, 6 Cal. 214; *People v. Millgate*, 5 Cal. 127.

As regards the instructions of the court with reference to character, the charge should be so phrased as to clearly import to the jury that if upon the whole evidence that of good character among the rest, the jury regard the crime conclusively proven to their satisfaction beyond a reasonable doubt, then the good character furnishes no defense and can be of no avail to defendant. *People v. Sweeney*, 133 N. Y. 609.

§ 379. **The Rule Restated.**—The true rule is, that such evidence must, in any event, be considered by the jury, together with the other facts and circumstances of the case; it is not merely of value in doubtful cases, but will of itself, sometimes, create a doubt where none could exist without it, and if good character be proved to the satisfaction of the jury, it should turn the scale in favor of the defendant, even in cases where, without it, the whole evidence would slightly preponderate against him. *Stephens v. People*, 4 Park. Crim. Rep. 396; *Cancemi v. People*, 16 N. Y. 501; 2 Russell, Crimes, 785, 786.

And Jewett, *J.*, says in *People v. Gay*, 7 N. Y. 381, "that in general a party will not be permitted to give evidence of his witness' good character until it has been attacked on the other side." A party is not allowed to sustain the character or chastity of his witness in advance of any attack. *People v. Hulse*, 3 Hill, 309; *People v. Gay*, *supra*; *Russell v. Coffin*, 8 Pick. 143; *People v. Van Houter*, 38 Hun, 168.

Nor is evidence of specific acts of violence towards third persons admissible. *People v. Lamb*, 2 Keyes, 371; *Eggler v. People*, 56 N. Y. 643; *Thomas v. People*, 67 N. Y. 218.

Epitomizing the present rules it may be advisable to cast them into the following propositions:

1. It is not permitted to the prosecution to attack the character

of the prisoner, unless he first puts that in issue by offering evidence of his good character.

2. It is not permitted to show the defendant's bad character by showing particular acts.

3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.

4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

In the case of *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325, the law in regard to the admissibility of evidence as to character is very fully and satisfactorily discussed. The distinction that the term "character" concerns what the man is, and the term "reputation" concerns what is said of him, is kept plainly in view; and it is clearly shown that the only legitimate mode of proving character is by showing reputation. *State v. Lapage, supra*.

§ 380. **When Negative Evidence of Character is Competent.**—The propriety of the rule, permitting negative evidence of good character, is gradually forcing itself upon the recognition of the courts, and there is a current and modern authority rapidly forming in support of it.

Mr. Taylor, in his work on Evidence, after observing that the term "character" is not synonymous with "disposition," but simply means reputation, or the general credit which a man has obtained in public opinion, observes as follows of the practice of the English judges to this point: "Aware that 'the best character is generally that which is the least talked about,' they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that 'they have never heard anything against the character of the person on whose behalf they had been called.' "Nay, some of the judges," he continues, "have gone so far as to assert that evidence in this negative form is the most cogent proof of a man's good reputation." 1 Taylor, Ev. § 350. In support of this view he cites the late case of *Reg. v. Cory*, 10 Cox, C. C. 23, where Cockburn, *Ch. J.*, observes: "I am ready to admit that negative evidence to which I have referred, of a man saying 'I never heard anything against the character of the person of whose

character I come to speak,' should not be excluded. I think, though it is given in a negative form, it is the most cogent evidence of a man's good character and reputation, because a man's character does not get talked about until there is some fault to be found with him. It is the best evidence of his character, that he is not talked about at all. I think the evidence is admissible in that sense."

A well considered case in direct support of this doctrine is that of *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769, where Berry, *J.*, observes: "A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative evidence of good character—as, for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and has never heard any remark, about his character—the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or, in other words, that his character is good." It was held accordingly that a witness might, when a proper predicate of knowledge has been laid, be permitted to testify negative to one's good character by affirming that he had never heard his character discussed, or spoken of by any one."

To the same effect is *Gandolfo v. State*, 11 Ohio St. 114, where negative evidence of a defendant's good character was allowed to be given. "Such evidence," it was said, "is often of the strongest description; as, where a character for truth is in issue, that among those acquainted with the party, it had never been questioned; and so, as to character for peace and quietness, that among those with whom the party associates, no instance has been known or heard of, in which he has been engaged in a quarrel."

In *State v. Nelson*, 58 Iowa, 208, the same rule was recognized, and a party was allowed to testify that he had never heard anything against the defendant's character or reputation, the court observing that, in the absence of such a rule, "a person, who had lived so far a blameless life as to provoke but little discussion respecting his character would oftentimes be utterly unable to support his character when assailed."

So in *Davis v. Foster*, 68 Ind. 258, an instruction to the jury was held good, which asserted that, "if a man's neighbors say

nothing whatever about him, as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good." And in *Davis v. Franke*, 33 Gratt. 413, a witness who had an opportunity to know another's character was allowed to testify that he never heard it called in question, Staples, *J.*, observing: "Possibly, in many cases, the highest tribute that can be paid to the witness is that his reputation as a man of veracity is never called in question, or even made the subject of conversation in the community where he resides."

In *Childs v. State*, 55 Ala. 28, a witness, who claimed to know the character of another witness, "but never heard his character discussed," was held competent to speak to the question of character. A like principle was declared in *Hadjo v. Gooden*, 13 Ala. 718.

In *Reid v. Reid*, 17 N. J. Eq. 101, much of the evidence as to the character of the witness was founded on opinions expressed by others after their examination, and a material portion was furnished by a person who made inquiries in the neighborhood of their residence for the purpose of procuring evidence in the cause. It is said: "All this evidence is clearly incompetent. No rule is better settled, or founded on clearer principles, than that which excludes all testimony touching reputation founded on opinion expressed *post litem motam*. Not only should the character of the witness be founded on reputation previously existing, but a stranger sent by a party to the neighborhood of the witness, to learn his character, will not be permitted to testify as to the result of his inquiries."

A very sensible and commendable instance of the relaxation of the old and strict rule is the reception of negative evidence of good character—as for example, the testimony of a witness who swears that he has been acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him, and he has never heard any remark about his character,—the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evidence that he gives no occasion for censure, or in other words, that his character is good. *Reg. v. Rowton*, 10 Cox, C. C. 25, 2 Hurd, Crim. Cas. 333; *Gandolfo v. State*, 11 Ohio St. 114; *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769.

That reputation may, with justice, well be called good which

no slanderer has ever ventured to even as much as question. A blameless life, oftentimes, though not always, gives origin to such a reputation. But when it can be said of a man, by those well acquainted with him, that they never heard his reputation as to truth and morals discussed, denied or doubted, it is equivalent to passing upon him the highest encomium. The authorities abundantly establish that the person testifying need not base his means of knowledge on what is "generally said" of the person whose character is in question, but may base his knowledge of the reputation of such person on evidence of the negative nature above noted. *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293; *Gandolfo v. State*, *supra*; Cockburn, *Ch. J.*, in *Reg. v. Rowton*, 1 Leigh & C. 536; *State v. Grate*, 68 Mo. 22; Kelly, *Crim. L.* § 241. See 1 Rice, *Civil Evidence*, p. 629.

CHAPTER XLVI.

EVIDENCE OF FORMER JEOPARDY OR CONVICTION.

- § 381. *Doctrine of Autrefois Acquit and Convict Examined.*
- 382. *How Question is Determined.*
- 383. *Views of Mr. Bishop.*
- 384. *Evidence that Jury were Discharged is Equivalent to an Acquittal.*
- 385. *Miscellaneous Authorities Examined.*

§ 381. **Doctrine of Autrefois Acquit and Convict Examined.**—The provision of the Constitution of the United States, that no person shall be twice put in jeopardy of life or limb for the same offense, is an explicit and solemn recognition of the maxim of the common law that no man shall be twice tried for the same offense; and the test by which the courts determine whether a person has been once in jeopardy, or once already tried, is whether a plea of *autrefois acquit* or *autrefois convict* can be sustained, according to the rules of the common law. *People v. Goodwin*, 18 Johns. 187; Story, Const. § 1787.

There is, it must be allowed, at least a seeming inconsistency in the language of the authorities upon the question. *Mr. Justice Blackstone* (4 Bl. Com. 336) says that the plea of a former conviction for the same identical crime, though no judgment was ever given or perhaps ever will be (being suspended by the benefit of clergy or for other causes) is a good plea in bar to an indictment. On the other hand, Sir Matthew Hale (Hale, P. C., 248) cites *Vaux's Case*, 4 Coke, Rep. 45, as holding that *autrefois convict* by verdict is no plea, unless judgment be given upon the conviction. In the opinion of *Chief Justice Spencer*, in the case of *People v. Goodwin, supra*, he says, speaking of a plea of a former acquittal, that, to render it a bar, there must have been a legal acquittal by judgment upon a trial for the same offense and the verdict of a petit jury. Chitty, in his *Criminal Law* (vol. 1, p. 462) speaks somewhat less distinctly of a sentence or judgment being requisite. He says, "the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful, on a sufficient indictment; and if he has neither

received sentence nor prayed the benefit of clergy, this plea is said not to be pleadable if the former indictment were invalid." There would seem to be a practical injustice, and an inconsistency with the meaning and spirit of the common law rule, as adopted by the constitutional provision in this country, in demanding that a prisoner should have received sentence in all cases before he should be allowed to plead that he had been once convicted, or had been once in jeopardy for the same offense. *Rex v. Bowman*, 6 Car. & P. 101; *State v. Elden*, 41 Me. 165; *Com. v. Roby*, 12 Pick. 496.

Pleas of the kind must allege that the former trial was in a court having jurisdiction of the case, and that the person and the offense are the same, and must set forth the former record, else the plea will be bad. *Rex v. Wildey*, 1 Maule & S. 188; 2 Russell, Crimes (4th ed.) 60; *Rex v. Edwards*, Russ. & R. 224.

Standard authorities which show that the plea of a former conviction or acquittal must set forth the substance of the record are very numerous and decisive. Where the plea is *autrefois convict*, it must appear that the prisoner received sentence as required by law; or if the plea be *autrefois acquit*, it must appear that the court gave the order that he go without day. Roscoe, Crim. Ev. (8th ed.) 199.

Defenses of the kind are often set up; and in order to avoid false pretenses, the established rule is, that the accused is required not only to show the nature of the former prosecution and the conviction or acquittal with certainty in his plea, but also to show the record or its substance to the court, by producing or vouching it at the time he pleads, for otherwise it would be in his power to delay the trial when he pleased by pleading a former conviction or acquittal in another jurisdiction; and, in order to prevent such false pretenses in pleading, the requirement is, that the plea shall show the record, or vouch it if it be in the same court in the first instance, and that he is not allowed to wait until *nul tiel record* is pleaded by the prosecutor. 2 Stark. Crim. Pl. 350.

The rule may be stated to be, that, to make the plea a bar, proof of the facts alleged in the second indictment must be sufficient in law to have warranted a conviction upon the first indictment of the same offense charged in the second, and not of a different offense. The general rule adopted for ascertaining the identity of the offenses is as stated by Archbold in his work

on Criminal Pleading, p. 106, where it is said: "The true test by which the question whether the plea is a bar in any particular may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first." Substantially the rule has been stated in the same way by Chitty in his work on Criminal Law. *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621.

"To sustain this plea (*autrefois convict* or *acquit*), it is not sufficient simply to put in the former record; some evidence must be given that the offenses charged in the former and present indictments are the same. This may be done by showing, by some person present at the former trial, what was the offense actually investigated there; and, if that is consistent with the charge in the second indictment, a presumptive case will thus be made out, which must be met by proof on the other side, of the diversity of the two offenses." *Wilson v. State*, 45 Tex. 77, 23 Am. Rep. 602; 1 Bishop, Crim. Proc. § 816.

It is the settled law that an acquittal on one indictment, in order to be a good defense to a subsequent indictment, must be an acquittal of the same identical offense as that charged in the second indictment. That fact must in some way appear from the plea itself, and that the offenses charged in both cases were the same in law and in fact. *Com. v. Roby*, 12 Pick. 496. The question must be determined by the facts appearing from the record, without the aid of extrinsic circumstances.

What constitutes legal jeopardy has led to much discussion and diverse constructions. By most courts the constitutional provisions forbidding that any person be subject for the same offense to be twice put in jeopardy (U. S. Const. Amendments, art. 5; N. Y. Const. art. 1, § 6) are construed to mean nothing more than the common law rule as applied in the plea of *autrefois acquit*. In such construction there must have been a final verdict of conviction or acquittal upon a valid indictment. Such is the rule in the United States courts (*United States v. Gilbert*, 2 Sumn. 41); in Massachusetts (*Com. v. Bowen*, 9 Mass. 494); in New York (*Shepherd v. People*, 25 N. Y. 406); and in many other states, as may be seen by reference to 1 Whart. Am. Crim. L. §§ 482-587. In other courts and in other states a very technical rule is adopted.

The words, by the law of the land, as used originally in Magna Charta, in reference to this subject, are understood to mean due

process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of due process of law, is that it means law in its regular course of administration, through courts of justice. 3 Story, Const. 264, 661; 1 Kent, Com. pt. IV., p. 13.

It is well settled, by abundant authority, that a person charged with the commission of a criminal offense, may waive any irregularity which exists in the case. He may waive a constitutional provision which is intended for his benefit. He may waive a trial by jury; he may waive a plea of *autrefois acquit* by not interposing it. He may also waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court. *Pierson v. People*, 79 N. Y. 424.

§ 382. **How Question is Determined.**—Obviously the most conclusive evidence the defense can furnish, is the record of the former conviction, and this seems to be required under the Missouri law. *State v. Rugan*, 68 Mo. 214. But as this rule would impose an unnecessary hardship upon the defense, it is well settled in most jurisdictions, that the record of the judgment is not absolutely essential. The identity of the two offenses may be established by either record or parol evidence. *State v. Maxwell*, 51 Iowa, 314; *Dunn v. State*, 70 Ind. 47; *Mount v. State*, 14 Ohio, 295, 45 Am. Dec. 542.

Whether the accused has been previously tried for the same offense is a question to be determined partly by the record of the previous trial, and partly by parol evidence in connection with it for the purpose of identification. The burden of maintaining the defense of former jeopardy is upon the person pleading it; the record of a conviction of one of the same name raises a presumption of identity, and where the offense proved on the former trial corresponds with that alleged in the complaint, the presumption is that they are the same. While the record of the former trial is necessary, if it is not accompanied by other evidence, it will be insufficient to sustain the plea, it being equally necessary to produce proof that the former prosecution was for the same offense, and it must not only show that jeopardy had once attached, but also that it had not been discharged by operation of law or waived by some act of the defendant. Am. & Eng. Enc. Law, title *Jeopardy*, citing *Bailey v. State*, 26 Ga. 579; *Campbell v. State*,

109 Ill. 565; *Walter v. State*, 105 Ind. 589; *Marshall v. State*, 8 Ind. 498; *Grisham v. State*, 19 Tex. App. 504; *Emerson v. State*, 43 Ark. 372; *Swalley v. People*, 2 West. Rep. 391, 116 Ill. 247; *Dunn v. State*, 70 Ind. 47; *Com. v. Dillane*, 11 Gray, 67; 1 Bishop, *Crim. L.* § 1050; *Whart. Crim. Pl. & Pr.* § 481; *Vowells v. Com.* 83 Ky. 193; *State v. Kelsoe*, 11 Mo. App. 91, 76 Mo. 505; *Boyer v. State*, 16 Ind. 451; *Hensley v. State*, 107 Ind. 587.

§ 383. **Views of Mr. Bishop.**—Mr. Bishop well expresses the prevailing juridical view in so far as evidence of a former conviction is concerned in the following language: "The former record is produced, and for what is provable thereby it is conclusive. Nor can the matter of the record be proved otherwise than by itself. There must be no variance between it and the plea. The identity of the parties and of the offense is established by parol testimony. . . . If the identity alike of the parties and of the offense is conceded, it becomes a question for the court, whether or not there has been a previous conviction or acquittal." 1 Bishop, *Crim. Proc.* § 816. This is in entire accord with the ancient common law authorities. 2 Hale, P. C. 241; *Rex v. Sheen*, 2 Car. & P. 635.

§ 384. **Evidence that Jury were Discharged is Equivalent to an Acquittal.**—It is well established that the discharge of a jury in a criminal case without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative, and that in such case the record must show the existence of the necessity which required such discharge, otherwise the defendant will be exonerated from the liability of further answering to the indictment. *Hines v. State*, 24 Ohio St. 134; *Mitchell v. State*, 42 Ohio St. 383; *Adams v. State*, 99 Ind. 244; *Powell v. State*, 17 Tex. App. 345; *Whitten v. State*, 61 Miss. 717; *Maden v. Emmons*, 83 Ind. 331; *State v. Connor*, 5 Coldw. 311; *Stewart v. State*, 15 Ohio St. 155; *Dobbins v. State*, 14 Ohio St. 493; *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Poage v. State*, 3 Ohio St. 229; *State v. Walker*, 26 Ind. 346; *Rulo v. State*, 19 Ind. 298; *Grant v. People*, 4 Park. Crim. Rep. 527; *McCorkle v. State*, 14 Ind. 39.

§ 385. **Miscellaneous Authorities Examined.**—Former acquittal, to be available as a defense, must be specially pleaded;

the plea is not admissible under the general issue. *Rickles v. State*, 68 Ala. 538; *State v. Morgan*, 95 N. C. 641.

Where the two trials of the same case were in the same court, it is not essential to interpose such pleas. *Foster v. State*, 25 Tex. App. 544; *Robinson v. State*, 21 Tex. App. 160.

As to former jeopardy, see *Com. v. Fitzpatrick*, 1 L. R. A. 451, 121 Pa. 109.

The plea of former acquittal is good only where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. *Hilands v. Com.* 5 Cent. Rep. 267, 114 Pa. 372; *Com. v. Trimmer*, 84 Pa. 69.

It applies where the transaction is the same and must be established by the same proof. *Shubert v. State*, 21 Tex. App. 551.

An acquittal under an indictment for larceny is a bar to a subsequent indictment alleging ownership in a different person and the taking on a different day. *Goode v. State*, 70 Ga. 752; *People v. Goodwin*, 18 Johns. 205; *Com. v. Bowden*, 9 Mass. 494; *Com. v. Purchase*, 2 Pick. 525.

Nor is such a party put in legal jeopardy if the term of the court, as fixed by law, comes to an end before the trial is finished. *State v. Brooks*, 3 Humph. 72; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *State v. Battle*, 7 Ala. 261; *Re Spier*, 12 N. C. 491; *Wright v. State*, 5 Ind. 292, 61 Am. Dec. 90; Cooley, Const. Lim. (4th ed.) 404. Nor if the jury are discharged before verdict, with the consent of the accused, expressed or implied. *State v. Slack*, 6 Ala. 676. Nor if the verdict is set aside on motion of the accused, nor on writ of error sued out in his behalf. *State v. Redman*, 17 Iowa, 329. Nor in case the judgment is arrested on his motion. *People v. Casborus*, 13 Johns. 351.

The authorities in support of the doctrine that the effect of granting a new trial on the application of the defendant is the same in a criminal as in a civil case, and opens the whole cause for retrial upon the same issues as on the first, are collected in the case of *State v. Behimer*, 20 Ohio St. 572. It seems to us, however, more in harmony with the humane maxims of the criminal law and the principles of the constitution, to hold that the finding of the jury acquitting the defendant of the higher offense was an adjudication upon that charge, and that legal effect should be given to it as such, while the new trial should be limited to the lower degree of homicide of which he had been convicted.

In the case of *Wilson v. State*, 24 Conn. 57, after an exhaustive examination of the question, it was held that the conviction of a person for petit larceny committed at the same time a burglary was committed, was not a bar to a subsequent prosecution for the burglary; and in case of *Com v. Roby*, 12 Pick. 496, it was held that a plea in bar is bad if the offenses charged in the two indictments be perfectly distinct in point of law, however closely they may be connected in point of fact. *State v. Martin*, 76 Mo. 337.

In *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550, the prisoners were indicted for murder in the first degree; they were tried on the plea of not guilty, and found guilty by the jury of murder in the second degree. A new trial was granted on their motion, and they were tried a second time and convicted for murder in the first degree. On appeal to the supreme court of Texas, the judgment was reversed. *Mr. Justice* Lipscomb, who delivered the opinion of the court, after examining the authorities, said: "The result of our investigation is, that both on principle and the authority of adjudged cases, the appellants, after having been acquitted of murder in the first degree, and found guilty of murder in the second degree, could not be legally tried and convicted of murder in the first degree, and that the verdict so finding them cannot stand as the basis of a judgment and execution thereon."

In *State v. Tweedy*, 11 Iowa, 351, the accused was indicted for murder in the second degree, and found guilty of manslaughter. The judgment was reversed on appeal, and the cause remanded for trial again. On the second trial, the court refused to instruct the jury that he had once been acquitted of murder, and could only be tried again for manslaughter. The case went again to the supreme court, and in a very able review of the authorities by *Mr. Justice* Wright, it was held that the verdict of manslaughter, on the first trial, was an acquittal of murder in the second degree, and that the prisoner could not again be put in jeopardy for that offense. The court said: "When the prisoner moved for a new trial, and appealed to this court, he sought to be relieved of a judgment against him for manslaughter. He had no complaint to make that the jury had not convicted him in the offense of murder. If, however, he might properly be subjected to a second trial for murder, then he is compelled to submit to a verdict which he may deem ever so erroneous, lest by disturbing it, when

insisting on his legal rights, he may place himself again in jeopardy. When a jury has once returned a verdict of guilty as to the lower offense, the prisoner should not, in our opinion, be placed in a position of additional hazard, by attempting to be relieved of the erroneous judgment. It is settled, upon authority, that if he obtains a new trial he may be again tried for the offense of which he was convicted. It is a very different thing, however when it is sought to try him for the offense of which he was not convicted, and which was not necessarily in the verdict of guilty." *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154.

CHAPTER XLVII.

DRUNKENNESS, INFANCY AND COVERTURE AS AN EXCUSE FOR CRIME.

- § 386. *Preliminary Statement.*
- 387. *Drunkenness no Excuse for Crime.*
- 388. *Presumption of Sanity Obtains.*
- 389. *New York Code Provisions.*
- 390. *Statement of the General Rule.*
- 391. *Instance of its Availability.*
- 392. *A Distinction Noted.*
- 393. *Non-age as an Excuse for Crime.*
- 394. *The Authorities Examined.*
- 395. *Evidence of Marital Coercion as an Excuse.*

§ 386. **Preliminary Statement.**—The contention so frequently forced upon the attention of our jurists to the effect that the sodden condition of the accused should operate an extenuation of his fault, is a phenomena in criminal prosecution that should be suppressed.

However strong the argument may be in the forum of conscience, in the dispensation of criminal justice it can find no place. It would not do to expose society to a doctrine so pernicious as this. It would never answer to say that a party who, in a drunken freak, comes into your house and murders you whilst you are harmless and inoffensive shall go free and unpunished. Life is too sacred and too dear—too valuable a gift from the Father and source of all life to be taken in this manner. The books contain but one rule upon this question from the earliest time down to the present, and that is, if a person voluntarily becomes drunk he shall be accountable for what he does while in that condition. It does not avail the accused that he did the unlawful act in the spirit of mere drunken bravado. Human life cannot be so cheapened as to permit voluntary drunkenness to shield an accused person who, in the commission of an unlawful act, unintentionally takes another's life. *Surber v. State*, 99 Ind. 71. This sufficient reason locates the law governing the subject.

§ 387. **Drunkenness no Excuse for Crime.**—Modern criminal

jurisprudence has long recognized the presence of an inexorable law, which refuses to admit mere intoxication as an excuse for crime. *Tidwell v. State*, 70 Ala. 33; *State v. Bullock*, 13 Ala. 413; *Friery v. People*, 54 Barb. 319; *People v. Robinson*, 1 Park. Crim. Rep. 649; *State v. Thompson*, 12 Nev. 140; *Shannah v. Com.* 8 Bush, 464; *State v. Turner*, Wright (Ohio) 20; *United States v. Drew*, 5 Mason, 28; *Boswell v. Com.* 20 Gratt. 860; *State v. Mullen*, 14 La. Ann. 577; *Rafferty v. People*, 66 Ill. 118; *McKenzie v. State*, 26 Ark. 335; *State v. Keath*, 83 N. C. 626; *People v. Williams*, 43 Cal. 344; *Choice v. State*, 31 Ga. 424; *State v. Hurley*, 1 Houst. Crim. Cas. 28; *People v. Porter*, 2 Park. Crim. Rep. 14; *Mercer v. State*, 17 Ga. 146; *People v. Willey*, 2 Park. Crim. Rep. 19; *Estes v. State*, 55 Ga. 30; *State v. Harlow*, 21 Mo. 446; *Marshall v. State*, 59 Ga. 154; *People v. Fuller*, 2 Park. Crim. Rep. 16; *Kenny v. People*, 31 N. Y. 330; *O'Brien v. People*, 48 Barb. 274; *Com. v. Hawkins*, 3 Gray, 463; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Com. v. Dougherty*, 1 Browne, App. 20; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Com. v. Hart*, 2 Brewst. 546; *Golden v. State*, 25 Ga. 527; 1 Russell, Crimes, 12; 2 Bl. Com. 25; Coke, Inst. 274a.

The foregoing adjudications sufficiently indicate the extended prevalence of the rule, any serious modification of this view would be dangerous to and subversive of public welfare. But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed; or where a crime, consisting of degrees, has been committed, such evidence may be important in determining the degree. Thus an intoxicated person may have a counterfeit bank bill in his possession for a lawful purpose, and, intending to pay a genuine bill to another person, may, by reason of such intoxication, hand him the counterfeit bill. As intent, in such case, is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed. *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558; *Cline v. State*, 43 Ohio St. 332.

A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate

act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime. *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873.

This exact question was before the New York court of appeals in the case of *People v. Rogers*, 18 N. Y. 18, 72 Am. Dec. 484. In delivering the judgment of the court in that case *Chief Justice Denio*, says: "When a principle in law is found to be well established by a series of authentic precedents, and especially where there is no conflict of authority, it is unnecessary for the judges to vindicate its wisdom or policy. It will, moreover, occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication, but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vice, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered censurable for any injury which in that state he may do to others or to society."

The same doctrine was long since enunciated by that eminent judge, Lord Mansfield, who said, in the celebrated case of *The Chamberlain of London v. Evans*, in the House of Lords, February 4, 1767, that a "man shall not be allowed to plead that he was drunk in bar of criminal prosecution, though, perhaps, he was at the time as incapable of the exercise of reason as if he had been insane, because his drunkenness was itself a crime, he shall not be allowed to excuse one crime by another." It is a settled maxim of the law "that a man shall not disable himself."

Mr. May, in his Criminal Law, § 22, says: "When, however, in the course of trial, a question arises as to the particular state of

the mind of the accused at the time when he committed a crime—as, for instance, whether he entertained a specific intent, or had express malice, or was acting with deliberation—the fact of intoxication becomes an admissible element to aid in its determination; not as an excuse for the crime, but as a means of determining its degree. If a man be so drunk as not to know what he is doing, he is incapable of forming any specific intent.” *Lancaster v. State*, 2 Lea, 575.

Continued and excessive drunkenness may render the accused incapable of forming or entertaining the specific intent which is a material ingredient of the statutory offense of an assault with intent to murder. *Ross v. State*, 62 Ala. 224.

§ 388. **Presumption of Sanity Obtains.**—The accused must be presumed to be sane till his insanity is proved. It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of the act; if he knew it was wrong and deserved punishment, he is responsible. Experts are not allowed to give their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon. If a person suffering under delirium tremens, is so far insane as not to know the nature of his act, etc., he is not punishable. If a person, while sane and responsible, makes himself intoxicated, and, while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible. *United States v. McGlue*, 1 Curt. C. C. 1.

It would be easy to multiply citations of modern cases upon this doctrine; but it is unnecessary, as they all agree upon the main proposition, namely, that mental alienation, produced by drinking intoxicating liquors, furnishes no immunity for crime.

§ 389. **New York Code Provisions.**—“No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.” N. Y. Penal Code, § 22.

If voluntary intoxication may be considered upon the question of intent, *a fortiori* upon that of deliberation.

§ 390. **Statement of the General Rule.**—At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence. *United States v. Drew*, 5 Mason, 28; *United States v. McGlue*, 1 Curt. C. C. 1; *Com. v. Hawkins*, 3 Gray, 463; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484. But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the supreme judicial court of Massachusetts in cases tried before a full court. *Com. v. Dorsey*, 103 Mass. 412, and in well considered cases in courts of other states. *Pirtle v. State*, 9 Humph. 663; *Haile v. State*, 11 Humph. 154; *Kelly v. Com.* 1 Grant Cas. 484; *Keenan v. Com.* 44 Pa. 55, 84 Am. Dec. 414; *Jones v. Com.* 75 Pa. 403; *People v. Belencia*, 21 Cal. 544; *People v. Williams*, 43 Cal. 344; *State v. Johnson*, 40 Conn. 136, 41 Conn. 584; *Pigman v. State*, 14 Ohio, 555, 45 Am. Dec. 558. And the same rule is expressly enacted in the Penal Code of Utah, § 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, and the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." Compiled Laws of Utah, of 1876, pp. 568, 569; *Hopt v. Utah*, 104 U. S. 631, 26 L. ed. 873.

§ 391. **Instances of its Availability.**—Drunkenness, although carried to the extent that it overcomes the will, and incapacities from controlling the action of the mind, is no excuse for a crime; and voluntary intoxication, although amounting to a frenzy, does not exempt one who commits a homicide without provocation, from the same construction of his conduct, and the same legal inferences upon the question of intent, as affecting the grade of

his crime, which are applicable to a person entirely sober. *Flanigan v. People*, 86 N. Y. 554, 40 Am. Rep. 556.

Intoxication, though not an excuse for crime, may reduce the crime of murder to the second degree. *Jones v. Com.* 75 Pa. 403; *Com. v. Crozier*, 1 Brewst. 349; *Com. v. Hart*, 2 Brewst. 546; *Com. v. Perrier*, 3 Phila. 229; *Com. v. Dunlop*, Lewis, Crim. L. 394; *Com. v. Haggerty*, Lewis, Crim. L. 402; *Com. v. Baker*, 11 Phila. 631; *Com. v. Platt*, 11 Phila. 415.

Many courts have allowed drunkenness to be shown in mitigation of the higher offense. In the case of *State v. Johnson*, 40 Conn. 136, the court held that intoxication, as tending to show that the prisoner was incapable of deliberation, might be given in evidence. *Chief Justice* Seymour dissented, and Foster, *J.*, who tried the case below, did not sit, so that the four judges constituting the court, were in fact, equally divided. The same case came before the court again in 41 Conn. 584, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that "we have enunciated no such doctrine," but "held on a trial for murder in first degree which under our statute requires actual express malice, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist." And, in the same opinion, the judge says: "Malice may be implied from the circumstances of the homicide. If a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and altogether afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime; and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil disposed persons, who receive the sanction of this

court." This reasoning seems to us both illogical and incongruous.

Intoxication may be considered in connection with other facts in rebuttal of malice (*State v. Tatro*, 50 Vt. 483; *Shannahan v. Com.* 8 Bush, 463, 373; *Golden v. State*, 25 Ga. 527; *Dawson v. State*, 16 Ind. 428; *Henry v. State*, 33 Ga. 441); or to test capacity to form a purpose (*Kenny v. People*, 31 N. Y. 330; *People v. Odell*, 1 Dak. 203); or to decide between right and wrong, to show incapacity to deliberate or to attack or defraud (*State v. Johnson*, 40 Conn. 136; *Wenz v. State*, 1 Tex. App. 36; *State v. Horne*, 9 Kan. 119) or as to whether threats were its result, or deliberate. *Lanergan v. People*, 50 Barb. 267; *People v. Eastwood*, 14 N. Y. 562.

It is available to disprove a specific intent, as to pass counterfeit money with intent to cheat (*United States v. Roudenbush*, Baldw. 514; *Pigman v. State*, 15 Ohio, 555, 45 Am. Dec. 558; but see, *Nichols v. State*, 8 Ohio St. 435; *State v. Avery*, 44 N. H. 392); or to commit suicide (*Lytle v. State*, 31 Ohio St. 196); or perjury (*Real v. People*, 42 N. Y. 270); or, in assault, an intent to murder (*Reg. v. Cruse*, 8 Car. & P. 541; *State v. Garvey*, 11 Minn. 154; *Mooney v. State*, 33 Ala. 419); or to do great bodily harm. *State v. McCants*, 1 Speer, L. 384; *Golliher v. Com.* 2 Duv. 163, 87 Am. Dec. 493; *Roberts v. People*, 19 Mich. 401; *Reg. v. Moore*, 3 Car. & K. 319.

In case of wanton killing without provocation, intoxication is not available to disprove the criminal intent. *O'Herrin v. State*, 14 Ind. 420; *Choice v. State*, 31 Ga. 424; *Humphreys v. State*, 45 Ga. 190; *Estes v. State*, 55 Ga. 30; *Rafferty v. People*, 66 Ill. 118; *Reg. v. Gamlen*, 1 Fost. & F. 90.

Intoxication furnishes no extenuation where a man forms the purpose when sober and takes liquor to prepare himself for the act. *People v. Fuller*, 2 Park. Crim. Rep. 16; *State v. Johnson*, 41 Conn. 584; *State v. Cross*, 27 Mo. 332; *State v. Harlow*, 21 Mo. 446; *Com. v. Hawkins*, 3 Gray, 463; *Com. v. Malone*, 114 Mass. 295; *United States v. Cornell*, 2 Mason, 91; *Friery v. People*, 54 Barb. 319; *State v. John*, 30 N. C. 330; but see, *State v. Hundley*, 46 Mo. 414; *Curry v. Com.* 2 Bush, 67; *Kriel v. Com.* 5 Bush, 362; *Shannahan v. Com.* 8 Bush, 463.

While intoxication *per se* is no defense to the fact of guilt, yet when the question of intent or premeditation is concerned, evi-

dence of it is admissible for the purpose of determining the precise degree. Great caution is undoubtedly necessary in the application of this doctrine, for, as has already been remarked, there are few cases of premeditated violent homicide, in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all, if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation *aliunde*, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life, or that there was no positive premeditation.

To disprove malice, drunkenness is certainly irrelevant. Thus, in Massachusetts, the law is that intoxication, at the time of committing a homicide, is not entitled to any weight in determining whether the provocation was such as to reduce the crime from murder to manslaughter. *Com. v. Hawkins*, 3 Gray, 463.

§ 392. **A Distinction Noted.**—On this branch of evidence *Mr. Justice Story* in the course of a trial before him said: “However criminal in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it, to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed when the defendant was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate, and not the remote cause; to the actual state of the party, and not to the cause which remotely, produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party; as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed sufficient excuse for any crime done under its influence.” *United States v. Drew*, 5 Mason, 28.

If a person is entirely incapacitated, by delirium tremens, so as

not to be conscious of the nature or moral turpitude of an act, he is not punishable therefor, even though such delirium tremens is produced by the voluntary use of intoxicating liquor. *United States v. Clarke*, 2 Cranch, C. C. 158; *United States v. McGlue*, 1 Curt. C. C. 1; *Bailey v. State*, 26 Ind. 422; *O'Brien v. People*, 48 Barb. 274; *Real v. People*, 55 Barb. 551, 42 N. Y. 270; *Lanergan v. People*, 6 Park. Crim. Rep. 209, 50 Barb. 266; *Willis v. Com.* 22 Alb. L. J. 176; Field, Lawyers' Briefs, § 276.

Both legal and medical writers recognize the fact that a continuous and excessive use of ardent liquors may result in such a state of insanity as to relieve from criminal responsibility. It is very different from acts produced in a state of ordinary intoxication, and must be governed by wholly different rules and principles. The trials of causes, as reported, show that there is no species of insanity in which the mind is so completely filled with hallucinations as that produced by this means. The result of an examination of the criminal cases where this defense was made, as well as an examination of the medical authorities upon the subject, show that acts of violence on the part of the victim of this unfortunate habit of alcoholism are often committed while he is recovering from his debauch. This sort of testimony is for the consideration of the jury, and with a view of enabling them to determine the condition of the mind of the defendant at the time of the offense. Was he, at such time, by reason of his previous habits of intoxication, rendered incapable of forming the intention, or of exercising the deliberation and premeditation, which are essential to the existence of crime?

Mental incapacity produced by voluntary intoxication existing only temporarily, but at the time of the commission of the offense, is no excuse for crime, nor a defense for a prosecution therefor. But where the habit of intoxication, though voluntary, has been long continued, and has produced disease which has perverted or destroyed the mental faculties of the accused, so that he was incapable at the time of the commission of the alleged crime, on account of the disease, of acting from motive, or distinguishing right from wrong,—in short, insane—he will not be held accountable for the act charged as a crime committed while in such condition. *Wagner v. State*, 116 Ind. 181.

§ 393. **Non-age as an Excuse for Crime.**—Blackstone, vol. 4, p. 23, says: "Under seven years of age, indeed, an infant can-

not be guilty of felony; for then a felonious discretion is almost an impossibility in nature." He further says that convictions have been had of infants between seven and fourteen. "But in all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction."

§ 394. **The Authorities Examined.**—The authorities which justify these preliminary observations will now be reviewed. In Broom's *Legal Maxims*, pp. 232, 233, it is said: "With regard to persons of immature years, the rule is, that no infant within the age of seven years can be guilty of felony, or be punished for any capital offense; for, within that age, an infant is by presumption of law *doli incapax*, and cannot be endowed with any discretion, and against this presumption no averment shall be received. This legal incapacity, however, ceases when the infant attains the age of fourteen years, after which period his acts become subject to the same rule of construction as those of any other person." "Between the ages of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *malitia supplet aetatem*—malice supplies the want of mature years. Accordingly, at the age above mentioned, the ordinary legal presumption may be rebutted by strong and pregnant evidence of mischievous discretion; for the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. In all such cases, the evidence of malice ought to be strong, and clear beyond all doubt and contradiction." See also Archbold, *Criminal Practice & Pleading*, pp. 11, 12, where the same rule is announced.

The doctrine recognized in the elementary books upon the question involved is, "that infants are *prima facie* unacquainted with guilt, and cannot be convicted, unless at the time the offense was committed they had a guilty knowledge that they were doing wrong."

This is not even a disputable presumption when applied to an infant under seven years of age; but between seven years and fourteen the commonwealth may rebut the presumption by showing a guilty knowledge on the part of the accused.

Russell says that this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances in his case. 1 Russell, *Crimes*, 2.

This same author suggests that "the proper course is to leave the case to the jury to say whether, at the time of the commission of the offense, such person had guilty knowledge that he was doing wrong."

The test given by Lord Hale is, "whether the accused at the time was capable of discerning between good and evil."

Taylor, in his work on Evidence, questions the philosophy of the rule laid down by Hale, for the reason that it is too indefinite, and may be applied "either to legal responsibility or to moral guilt." 1 Taylor, Ev. 190.

Few infants between the ages of seven and fourteen years, with ordinary intellects, are so ignorant as not to know that to lie or steal is wrong; and, therefore, in applying the rule laid down by Lord Hale or Russell, the infant derives no benefit from the legal presumption, and, instead of being favored by the law, is dealt with in the same manner as those more advanced in life.

A sense of moral guilt only on the part of the infant, in the absence of a knowledge of his legal responsibility for his wrongful act, will not authorize a conviction.

When the prosecution satisfies the jury that the infant, at the time he committed the offense, knew it was wrong, and was aware of his legal responsibility for the commission of the crime, the legal presumption of innocence on account of his tender years no longer exists; but in the absence of such proof, the legal presumption must produce an acquittal. *Willett v. Com.* 13 Bush, 230.

The attitude of criminal law upon this subject has crystalized into statutory form in England, and from it Sir James Stephen has redacted the following as expressive of its intent: "No act done by any person under seven years of age is a crime. No act done by any person over seven and under fourteen years of age is a crime, unless it be shown affirmatively that such person had sufficient capacity to know that the act was wrong." Stephen, Dig. art. 25, 26.

For authorities sustaining these propositions, the distinguished author cites 1 Hale, P. C. 27, 28; 1 Russell, Crimes, 7; *Rex v. Owen*, 9 Car. & P. 236; and see cases collected, 1 Russell, Crimes, 7-10.

Sometimes statutes exist with reference to the criminal responsibility of minors. For example, in Texas, it is provided by

statute, that no person shall be convicted of any offense committed between the ages of nine and thirteen years, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act. Paschal, Dig. art. 1638. Under this statute it is held, that the prosecution must prove that a defendant, who comes within the statute and who is indicted for murder, knew that the killing of a human being was a great crime, prohibited by law under severe penalties. *Wusing v. State*, 33 Tex. 651. The same rule prevails in Alabama, except that the age of the infant is fixed at seven and fourteen. *Godfrey v. State*, 31 Ala. 323.

With regard to capital crimes the law is, very properly, more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion, than in cases of inferior grade; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil when he committed the offense, he may be convicted and suffer death. Tyler, *Infancy & Coverture*, 189.

Evidence that a boy is under the age of fourteen is always competent and where such a fact is made to appear is not liable for false pretense. *Doran v. Smith*, 49 Vt. 353. The question in all instances of his capacity to know good from evil, is a question of fact to be determined by the jury. *People v. Davis*, 1 Wheel. Crim. Cas. 230; *State v. Doherty*, 2 Overt. 80; *People v. Walker*, 5 City Hall Rec. 137; *Stage v. People*, 5 City Hall Rec. 177; *Reg. v. Smith*, 1 Cox, C. C. 260; *Rex v. Owen*, 4 Car. & P. 236.

§ 395. **Evidence of Marital Coercion as an Excuse.**—It is a general rule of law that persons are excused from those acts which are not done of their own free will, but in subjection to the powers of others. And as to persons in private relations, the principal case where such constraint is allowed as an excuse for criminal misconduct, is that of a wife, based upon the idea of her matrimonial subjection of her husband. She will not be able to suffer for an offense done by his coercion, or in his company which the law construes as coercive. But the coercion from being in his company is only presumed; and if it appears that she was not urged or drawn to the offense by him, but was an inciter of it, she is as guilty as he is. If she steal of her own will, or by the bare command of her husband or of his procurement, she is

liable as well as he. *Reg. v. Buncombe*, 1 Cox, C. C. 183; *Rex v. Hughes*, 2 Lew. C. C. 229, cited in 1 Russell, Crimes, *22. The presence of the husband is not an absolute excuse, it gives only a prima facie presumption of coercion.

The prima facie presumption that the wife was coerced into committing the crime could be rebutted by showing that she was the more active party. *Wagner v. Bill*, 19 Barb. 321; *Rex v. Hughes*, 2 Lew. C. C. 229; *Reg. v. Cohen*, 11 Cox, C. C. 99; *Rex v. Morris*, Russ. & R. 270; 2 Barbour, Crim. L. 273; 1 Russell, Crimes, 18, 21, 22.

The rule is everywhere established, that the commission of a criminal act raises the presumption of the criminal intent, notwithstanding that the criminal was drunk when he committed it. No other rule would be consistent with the safety of society. But where the existence of a specific intent is necessary to the criminal act, a degree of drunkenness, incompatible with the formation of that intent, negatives the act, and disproves the crime. Robinson, Elementary Law, § 387, citing Broom, Com. 887, 888; 1 Hale, P. C. 32; 1 Russell, Crimes, 7, 8; 1 Whart. Crim. L. §§ 32-44; 1 Bishop, Crim. L. §§ 397-416; 1 Bennett & Heard, Lead. Crim. Cas. 131-145.

CHAPTER XLVIII.

EVIDENCE OF INSANITY.

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§ 396. **Preliminary Observations.**—The frequency with which the records of appeal in cases of homicide are incumbered with allegations of error regarding the instruction of the trial court as to what constitutes insanity, renders it desirable to reach some satisfactory conclusion on this subject. Our state reports contain many formulas which are designed to embody the existing law, and after a careful review of the various judicial dicta, we are inclined to recommend the instructions contained in the case of *Baldwin v. State*, 12 Mo. 223. The judge's charge in that particular case has been the subject of much comment and critical examination. It has been found to harmonize with both public sentiment and statutory law, in that it is founded upon the principle that "*in medio tutissimus est*" is found a rule lying between two extremes. This decision is authority for the broad proposition that the defense of insanity is established when the evidence offered in support of it preponderates in favor of the fact, and reasonably satisfies the jury that it existed at the time the criminal act charged was committed. The fact that insanity is so easily simulated demonstrates the wisdom of the rule, and affords a strong reason why we should adhere to it.

Dr. Ray has well observed: "No cases subjected to legal inquiry are more calculated to puzzle the understandings of courts and juries, to mock the wisdom of the learned, and baffle the acuteness of the shrewd, than those connected with questions of imbecility;" and he might have safely added, insanity generally. See Ray, *Insanity* (3d ed.) § 104.

§ 397. **Conflicting Theories Regarding the Subject.**—Two conflicting theories are struggling for ascendancy in the criminal jurisprudence of the country, as regards the degree of evidence

necessary to uphold a conviction where insanity is interposed as a defense. The first theory is of English origin and generally obtains in Alabama, Arkansas, California, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Pennsylvania, Virginia, West Virginia and Texas, with some slight modification. The rulings in these states substantially hold, that the jury must regard the preponderance of evidence as controlling their decision on the question of lunacy—that is, it need not be established beyond a reasonable doubt. The second group of cases have been decided by the courts of New Hampshire, Vermont, Michigan, Illinois, Indiana, Kansas, and possibly New York, and go far to sustain the contention, that under the defense of insanity, it is for the state to prove that the accused was *compos mentis* beyond a reasonable doubt.

A review of the authorities will show the subtle distinction to which this subject gives rise and the infinite diversities of its application.

State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Wright v. People*, 4 Neb. 408; *Cunningham v. State*, 56 Miss. 272, 21 Am. Rep. 360; *People v. Finley*, 38 Mich. 482; *McAllister v. State*, 17 Ala. 436, 52 Am. Dec. 180; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Crawford*, 11 Kan. 32; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *McKenzie v. State*, 26 Ark. 334; *Stevens v. State*, 31 Ind. 485; *People v. Myers*, 20 Cal. 518; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *People v. Coffman*, 24 Cal. 233; *Chase v. People*, 40 Ill. 352; *People v. McDonnell*, 47 Cal. 134; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *People v. Wilson*, 49 Cal. 14; *Fisher v. People*, 23 Ill. 293; *State v. Hoyt*, 46 Conn. 330; *Boswell v. Com.* 20 Gratt. 860; *State v. Danby*, 1 Houst. Crim. Cas. 175; *Clark v. State*, 8 Tex. App. 350; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *State v. Felter*, 32 Iowa, 50; *Dove v. State*, 3 Heisk. 348; *Kriel v. Com.* 5 Bush, 362; *Sayres v. Com.* 88 Pa. 301; *Graham v. Com.* 16 B. Mon. 587; *Pannell v. Com.* 86 Pa. 268; *Smith v. Com.* 1 Duv. 224; *Meyers v. Com.* 83 Pa. 141; *State v. Lawrence*, 57 Me. 574; *Lynch v. Com.* 77 Pa. 205; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Ortwein v. Com.* 76 Pa. 423, 18 Am. Rep. 420; *Com. v. Eddy*, 7 Gray, 583; *Bergin v. State*, 31 Ohio St. 115; *Com. v. Heath*, 11 Gray, 303;

Loeffner v. State, 10 Ohio St. 598; *Bonfanti v. State*, 2 Minn. 123; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *State v. Gut*, 13 Minn. 341; *Morehead v. Brown*, 51 N. C. 367; *Baldwin v. State*, 12 Mo. 223; *State v. Spencer*, 21 N. J. L. 201; *State v. Huting*, 21 Mo. 464; *State v. Boice*, 1 Houst. Crim. Cas. 355; *State v. Klinger*, 43 Mo. 127; *State v. Pratt*, 1 Houst. Crim. Cas. 269; *State v. Smith*, 53 Mo. 267; *State v. Draper*, 1 Houst. Crim. Cas. 531; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462.

For authorities holding that the burden is with the accused to show his insanity by a preponderance of evidence, where this plea is interposed in traverse of an indictment, see *State v. Bartlett*, 43 N. H. 224; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Reg. v. McNaghten*, 10 Clark & F. 200; *People v. Schryver*, 42 N. Y. 9, 1 Am. Rep. 480; *Freeman v. People*, 4 Denio, 28, 47 Am. Dec. 216; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *People v. Pine*, 2 Barb. 573; *Wagner v. People*, 4 Abb. App. Dec. 511; *People v. Robinson*, 1 Park. Crim. Rep. 649; *Brother-ton v. People*, 75 N. Y. 163; *State v. Brinyea*, 5 Ala. 241; *Westmoreland v. State*, 45 Ga. 225; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *State v. McCoy*, 34 Mo. 531; *United States v. McGlue*, 1 Curt. C. C. 1; *State v. Starling*, 51 N. C. 366; *State v. Coleman*, 27 La. Ann. 691; *State v. Strauder*, 11 W. Va. 745; *State v. Hundley*, 46 Mo. 414; *Wright v. People*, *Chase v. People*, *Graham v. Com.* *State v. Klinger*, *People v. Coffman*, *Fisher v. People*, *Bonfanti v. State*, *Leffner v. State*, *People v. McDonnell*, *State v. Felter*, *Boswell v. Com.* and *Kriel v. Com. supra*.

§ 398. **Insanity should be Established beyond a Reasonable Doubt.**—It is a general rule, applicable to all criminal trials, that to warrant a conviction the evidence should satisfy the jury of the defendant's guilt beyond a reasonable doubt; and it has been held that there is a distinction in this respect between civil and criminal cases. This rule is based upon the presumption of innocence, which always exists in favor of every individual charged with the commission of a crime. It is also a rule, well established by authority, that where, in a criminal case, insanity is set up as a defense, the burden of proving the defense is with the defendant, as the law presumed every man to be sane. But I apprehend that the same evidence will establish the defense which would prove insanity in a civil case. The rule requiring the evidence to satisfy the jury beyond a reasonable doubt is one in favor of the

individual on trial charged with the crime, and is applicable only to the general conclusion, from the whole evidence, of guilty or not guilty.

In *State v. Spencer*, 21 N. J. L. 196, *Chief Justice* Hornblower laid down the rule that, in order to acquit a person on the ground of insanity, the proof of insanity, at the time of committing the act, ought to be as clear and satisfactory as the proof of committing the act ought to be in order to find a sane man guilty.

In a capital case where insanity is interposed as a defense all rules of strict construction as to the admission of evidence, should be relaxed.

Even in case where the court is convinced that the defense is spurious and improvised as a last resort for evading the consequences of crime, its duty is to hear the evidence for the defense and refrain from any expression of personal opinion regarding it. *DeJarnette v. Com.* 75 Va. 867; *Fain v. Com.* 78 Ky. 183, 39 Am. Rep. 213; *Walsh v. People*, 88 N. Y. 458.

So evidence of somnolentia is receivable. *Fain v. Com. supra.*

And evidence of derangement or mental disturbance, in the ancestors or blood relations of the accused must be regarded as always competent.

So it is error to exclude evidence that the father and brothers of the prisoner were the subjects of epilepsy and of strange conduct, tending to show that they were tainted with insanity. *Baxter v. Abbott*, 7 Gray, 71; *Cole's Trial*, 7 Abb. Pr. N. S. 330, 331; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Coon v. Andrews*, Mass. 1868, cited in 1 Whart. & S. Medical Jurisprudence, § 375; 1 Whart. Am. Crim. L. § 57.

As a question of evidence, the burden of proof of sanity is upon the government in all cases. The act must not only be proved, but it must also be proved that it is the voluntary act of an intelligent person. Where the will does not co-operate, there is no intent. But as sanity is the normal state of the human mind, the law presumes everyone sane till the contrary is shown; and this presumption, in the absence of evidence to the contrary, is sufficient to sustain this burden of proof. If, however, the defendant can, by the introduction of evidence, raise a reasonable doubt upon the question of sanity, he is to be acquitted. This is the general rule, supported by the great weight of authority. In

some of the states, however, it is held that if the prisoner sets up insanity in defense, he must prove it by a preponderance of evidence, or it is of no avail. It is not enough for him to raise a reasonable doubt on the point. In New York, the authorities seem to be conflicting. In New Jersey, it seems to be the law that the prisoner must prove the defense of insanity beyond a reasonable doubt. May, *Crim. L.* § 20, citing *Com. v. Pomeroy*, 117 Mass. 143; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Crawford*, 11 Kan. 32, 32 Am. L. Reg. N. S. 21 and note; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Dove v. State*, 3 Heisk. 348; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Lynch v. Com.* 77 Pa. 205; *Kelly v. State*, 3 Smedes & M. 518; *State v. Felter*, 32 Iowa, 49; *People v. Best*, 39 Cal. 690; *State v. Lynch* (Mo.) 4 L. & Eq. Rep. 653; *Boswell v. Com.* 20 Gratt. 866; *Wagner v. People*, 4 Abb. App. Dec. 509; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *State v. Spencer*, 21 N. J. L. 202.

§ 399. **Statement of the Doctrine in the Boswell Case.**—The questions involved in this chapter were fully and elaborately considered in *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20, where the authorities on the subject in both England and America are lucidly reviewed in the opinion of *Mr. Justice Stone* speaking for a majority of the court. The doctrine is there held, that insanity is a defense which must be established to the satisfaction of the jury, by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal. A subsequent case in the same court (*Ford v. State*, 71 Ala. 385) involving substantially the same question, elicited the same expressions from *Mr. Justice Somerville*. Traveling with the utmost caution to the conclusion reached, he says: "I confess, if the question were a new one, that, apart from authority, I should be greatly disposed to favor the view that, although the law presumed sanity, it at the same time presumed innocence, that these presumptions are each disputable and must go to the jury to be considered by them in connection with the other evidence, and that if the jury, upon the facts and conflicting presumptions of the whole case, entertain a reasonable doubt that the crime charged was committed by the prisoner while in a sane state of mind, he is entitled to an acquit-

tal. This is the modern or strictly American doctrine, and finds no countenance, so far as I can discover, among the best law-writers or adjudged cases in England. It seems to be approved by Mr. Bishop alone of the American text-writers, and finds support in the decisions of only some nine or ten of the highest courts of the several states. 2 Bishop, Crim. Proc. § 673; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Cunningham v. State*, 56 Miss. 269, 21 Am. Rep. 360; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Crawford*, 11 Kan. 32; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Chase v. People*, 40 Ill. 352; *Wright v. People*, 4 Neb. 407; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Dove v. State*, 3 Heisk. 348; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *State v. Waterman*, 1 Nev. 543.

"The doctrine of Boswell's case, which repudiated the ordinary rule of reasonable doubt as applicable to insanity cases, is, however, sustained by the great weight of authority. It seems to be approved by all of the English text-writers and adjudged cases coming within the sanction of the common law which, for many forcible reasons placed insanity upon a basis somewhat different from other defenses. *Reg. v. McNaghten*, 10 Clark & F. 200; *Reg. v. Higginson*, 1 Car. & K. 130; Russell, Crimes (9th ed.) 525. It is said, in Roscoe's Criminal Evidence, that 'the *onus* of proving the defense of insanity, or in the case of lunacy, of showing that the offense was committed when the prisoner was in a state of lunacy, lies on the prisoner.' Roscoe, Crim. Ev. (7th ed.) 975. In Foster's Crown Law it is said, 'all the circumstances of the accident, necessity or infirmity, are to be satisfactorily proved by the prisoner.' Foster, Crown L. 225.

"Among the American authors, Mr. Wharton strongly favors the view that the burden of the proof is on the defendant to prove his insanity by a preponderance of the evidence, the defense being said to be extrinsic and likened to an application in 'the nature of a plea to the jurisdiction, or a motion for change of venue.' Whart. Hom. § 668; Whart. Crim. Ev. § 340; Whart. Am. Crim. L. (7th ed.) § 54. Mr. Greenleaf says that the defense 'must be clearly proved,'—and again that it 'must be established by evidence satisfactory to the jury.' 2 Greenl. Ev. § 373; 3 Greenl. Ev. 5. The adjudged cases in this country present a vast weight of authority favorable to the doctrine of Boswell's case, or at least in repudiation of the rule entitling the defendant to an

acquittal upon the existence of a mere reasonable doubt of his sanity. Many of these cases state the rule more strongly against the defendant, and some go to the length that the defendant must establish his insanity to the satisfaction of the jury beyond a reasonable doubt. These views prevail in several of the states. *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Com. v. Heath*, 11 Gray, 303; *Sayres v. Com.* 88 Pa. 291; *State v. Felter*, 32 Iowa, 49; *State v. Payne*, 86 N. C. 609; *Graham v. Com.* 16 B. Mon. 587; *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606; *State v. Stark*, 1 Strobb. L. 479; *State v. Lawrence*, 57 Me. 574; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *Bergin v. State*, 31 Ohio St. 111; *Webb v. State*, 9 Tex. App. 490; *Boswell v. Com.* 20 Gratt. 860; *People v. Messersmith*, 57 Cal. 575; *State v. Gut*, 13 Minn. 341; *McKenzie v. State*, 26 Ark. 334; *Carter v. State*, 56 Ga. 463; *State v. Spencer*, 21 N. J. L. 196; *State v. Danby*, 1 Houst. Crim. Rep. 166; *State v. Hoyt*, 46 Conn. 330."

§ 400. **Wide Acceptance of the Rule last Stated.**—The Pennsylvania courts have accepted the doctrine of the *Boswell* case, as is abundantly evidenced by *Chief Justice Agnew* in *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420. "Insanity is a defense. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of willful and malicious killing has been proved, and requires a verdict of murder, the prisoner, as a defense, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will, and, therefore, that he is not legally responsible for his act. . . . Soundness of mind is the natural and normal condition of men, and is necessarily presumed; not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being, until a fact so abnormal as a want of reason positively appears. It is therefore not unjust to him that he should be so conclusively presumed to be, until the contrary is made to appear on his behalf. To be made so to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature."

The position of the Pennsylvania court as above outlined is the accepted rule in other jurisdictions as is shown by the following cases: *McKenzie v. State*, 26 Ark. 334; *State v. Smith*, 53 Mo. 267; *State v. Felter*, 32 Iowa, 50; *People v. McDonnell*, 47 Cal. 134; *State v. Starling*, 51 N. C. 366; *State v. Lawrence*, 57 Me. 574; *Loeffner v. State*, 10 Ohio St. 599; 2 Greenl. Ev. § 373; Whart. Hom. § 665.

§ 401. **Attitude of the New York Court.**—"An act done by a person who is an idiot, imbecile, lunatic or insane, is not a crime. A person cannot be tried, sentenced to any punishment or punished for crime when he is in a state of idiocy, imbecility, lunacy or insanity so as to be incapable of understanding the proceeding or making his defense. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as either,

1. Not to know the nature and quality of the act he was doing; or
2. Not to know that the act was wrong." N. Y. Penal Code, §§ 20, 21.

Any evidence tending to show the presence of sufficient mental capacity to distinguish between right and wrong is relevant as it is well settled that if the will power is not overthrown by disease, there is criminal responsibility.

Mere weakness of intellect will not shield one who commits a crime. *Goodwin v. State*, 96 Ind. 551; *Wartena v. State*, 105 Ind. 445; *Warner v. State*, 114 Ind. 137.

So, it is not error for the court to inform the jury that the evidence on the subject of mental capacity might be considered by them for the purpose of determining the mental status and capacity of the defendant. *Conway v. State*, 118 Ind. 483.

Where a previous condition of insanity is shown, the prosecution may show that the crime charged in the indictment was committed during a lucid interval. *People v. Montgomery*, 13 Abb. Pr. N. S. 207.

The New York rules have been generally adopted, and where the evidence shows the accused to be capable of discriminating between right and wrong, responsibility attaches. The theory that he is without power to control his actions no longer prevails.

Walker v. People, 88 N. Y. 86; *Kearney v. People*, 11 Colo. 258; *People v. Coleman*, 1 N. Y. Crim. Rep. 1; *United States v.*

Faulkner, 35 Fed. Rep. 730; *Casey v. People*, 31 Hun, 158; *State v. Potts*, 100 N. C. 457; *People v. Walworth*, 4 N. Y. Crim. Rep. 355; *State v. Mowry*, 37 Kan. 369; *People v. Carnel*, 2 Edm. Sel. Cas. 200; *Cunningham v. State*, 56 Miss. 369, 21 Am. Rep. 360; *Willis v. People*, 32 N. Y. 715; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 263; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *United States v. Young*, 25 Fed. Rep. 710, 7 Crim. L. Mag. 732; *Wagner v. People*, 2 Keyes, 684; *State v. Lewis*, (Nev.) 12 Crim. L. Mag. 72; *People v. Waltz*, 50 How. Pr. 204; *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651; *People v. Kleim*, 1 Edm. Sel. Cas. 13; *State v. Murray*, 11 Or. 413; *People v. Montgomery*, 13 Abb. Pr. N. S. 207; *People v. Sprague*, 2 Park. Crim. Rep. 43; *People v. Moett*, 23 Hun, 60.

If an article on "Insanity and Criminal Responsibility" (12 Crim. L. Mag. 1) the writer says: "Common sense, reason and the weight of legal authority sustain the doctrine that if a person commits a crime, and at the time knows he is doing wrong, he should be held criminally responsible for his act. This is the only doctrine that will protect our social relations, uphold morality and religion. Speculative philosophy and phrenological interpretation of the state of the mind is no test as to one's insanity and are incompatible with the principles of rational psychology."

Evidence that the accused believes himself to be under a demonic influence—possessed of a devil, is unavailing as a defense to crime, provided always that the power of judging between right and wrong exists. *People v. Waltz*, 50 How. Pr. 204.

So, delirium tremens where it is shown to have utterly clouded the intellectual perceptions of the accused to the extent of depriving him of all knowledge of right and wrong is a shield from the criminal responsibility. *People v. Carpenter*, 102 N. Y. 250; *O'Brien v. People*, 48 Barb. 274; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Reg. v. Davis*, 14 Cox, C. C. 563; *Erwin v. State*, 10 Tex. App. 700; *United States v. Guiteau* (D. C.) 3 Crim. L. Mag. 358.

The doctrine that a criminal act may be excused upon the evidence of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. *People v. Carpenter*, *supra*.

§ 402. **The Celebrated McNaughten Case Considered.**—The "right and wrong test," or the capacity of the prisoner to dis-

tinguish between right and wrong, received its first judicial sanction in 1843, in what is known as the *McNaghten Case*, reported in 10 Clark & F. 200. Some of the American courts have adopted the principle in its entirety. But vigorous dissent appears in the courts of Illinois and Indiana, where the principle is distinctly repudiated; and New Hampshire might provisionally be included as hostile to the doctrine as originally promulgated. Mr. Boswell in his well known work on Insanity, § 437, in criticising the *McNaghten Case*, says the language of the rule is open to misconstruction. The true inquiry is, and the jury must determine from the evidence—had he sufficient mental power to choose the right and reject the wrong.

But whatever consideration might otherwise have been due, in view of its highly reputable parentage, to the *McNaghten Case*, and to the reasons and decisions on which it rested many reputable American authorities are receding from the position contended for in that case and are adopting views more in harmony with the advanced scientific investigation of the day. Indeed it may be well said that the criticisms which have been already made upon it, have greatly impaired its standing as an authority and threaten to divest it of any claim to attention whatever. This we shall endeavor to make more fully apparent as we proceed.

Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from that of the court in the trial of a case of this character. The province of the jury is to determine facts, that of the court to state the law. The rule in *McNaghten's Case* arrogates to the court, in legal effect, the right to assert as matter of law the following propositions: (1) That there is but a single test to the existence of that degree of insanity such as confers irresponsibility for crime; (2) that there does not exist any case of such insanity in which that single test—the capacity to distinguish right from wrong—does not appear; (3) that all other evidence of alleged insanity, supposed by physicians and experts to indicate a destruction of the freedom of the human will, and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

The whole difficulty, as justly said by the supreme judicial court of New Hampshire, is that "courts have undertaken to declare that to be law which is matter of fact." "If," observes

the court, "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself to be qualified to testify as an expert." *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

The dissent of the Illinois court from the general rule, as here enunciated, will be found recorded in the opinion of *Mr. Justice Breese* in *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, and the jurists of that state have steadily refused to recede from that position. The language of the court is as follows: "We do not propose to go into an examination of the various decisions, English and American, on this subject, it being sufficient to say that no certain, uniform and definite rule can be gathered from them. In the midst of this uncertainty, with the best reflection and examination which we have been able to give to this very important and most interesting question, we have come to the conclusion that a safe and reasonable test in all such cases would be that whenever it should appear from the evidence that at the time of doing the act charged the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion and caused by it, and by nothing else, justice and humanity alike demand an acquittal."

When insanity is set up as a defense by a person accused of crime, then, before the jury can acquit the accused on the ground of insanity, it must appear, from the evidence in the case, that at the time of the commission of the crime the accused was not of sound mind, but affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, by overriding his reason and judgment, etc.

This language is in entire harmony with the rule announced by

the Illinois court in *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, and *Chase v. People*, 40 Ill. 352. We regard the principles adopted as wise, humane and reasonable, protecting alike, as best can be done with our imperfect knowledge of mental diseases, the great interests of society and this most unfortunate class of persons when arraigned for the commission of crime. *Dacey v. People*, 116 Ill. 555.

§ 403. "Right and Wrong" Test Considered by Mr. Justice Ladd of New Hampshire.—From a distracting mass of adjudication upon this subject wherein logic and metaphysics, hypercriticism and medical whim-wham unite in obscuring the subject it is positively refreshing to find the New Hampshire supreme court sustaining its conclusions by arguments founded upon a critical analysis of the previous decisions, English and American, and suggested by some promptings of plain, ordinary common sense. The ultimate question to be determined in all cases involving this inquiry, is, whether at the time of the commission of the act the evidence shows that the accused had the mental capacity to entertain a criminal intention—and whether in point of fact he did entertain such intention. In solving this problem as in all other cases, it is for the court to find the law and for the jury to find the fact. The pivotal question is, what part of this difficult inquiry is law, and what part is fact? The New Hampshire court strikes at the very pith and marrow in *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; and I shall indulge in a very extended extract from the opinion of *Mr. Justice Ladd*, which embodies the best features of the argument usually employed to support the views of those representing the minority as follows:

"The numerical preponderance of authority in England, as gathered from the cases, would seem to be decidedly in favor of the rule that knowledge of right and wrong, without reference to the particular act, is the test, although their force is much shaken, if not wholly overthrown, by the qualifications which judges have seemed to feel at liberty to introduce, to meet their individual views, or the exigencies of particular cases; and especially by the charge of Lord Denman in *Reg. v. Oxford*, 9 Car. & P. 525.

"The memorable effort of the House of Lords, in 1843, to have the confusion and conflict of opinion which had arisen on this perplexing question all cleared away by one distinct and full avowal by the judges of what the law was and should be in rela-

tion to it, is too conspicuous in the history of the subject to be passed without notice.

a. **Analysis of the *McNaghten Case*.**—"It may safely be said that the character of the judges, and the circumstances under which the question in *McNaghten's Case* (see *Reg. v. Higginson*, 1 Car. & K. 130, *note*) were propounded to them by the House of Lords, make it morally certain that if, in the nature of things, clear, categorical, and consistent answers were possible, such answers would have been given. In other words, that if a safe, practical, legal test exists, it would have been then found by those very learned men, and declared to the world. Such a result would have brought order out of chaos, and saved future generations of lawyers and judges a vast amount of trouble in trying this particular felony. But an examination of the answers given shows that they failed utterly to do any such thing, and it is not too much to say that, if they did not make the path to be pursued absolutely more uncertain and more dark, they at best shed but little light upon its windings, and furnish no plain or safe clue to the labyrinth.

"In answer to the first question, all the judges, except Maule, say that 'notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which is meant the law of the land.' Here is an entirely new element—knowledge that he was acting contrary to the law of the land; and hereupon the inquiry arises: Is a man, acting under a delusion of this sort, presumed to know the law of the land? The answer must be, Yes; for the judges say, further on: 'The law is administered upon the principle that every one must be taken conclusively to know the law of the land, without proof that he does know it.'

"Let this proposition be examined a moment. Knowledge that the act was contrary to the law of the land is here given as a test; that is, such knowledge is assumed to be the measure of mental capacity sufficient to entertain a criminal intent. By what possible means, it may be asked, can that test or measure be applied, without first finding out whether the prisoner, in fact, knew what

the law of the land was? How could a jury say whether a man knew, or did not know, that an act was contrary to the law of the land, without first ascertaining whether he knew what the law was? . . .

"In answer to the second and third questions, which relate to the terms in which the matter should be left to the jury, the judges say that 'to establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know he was doing what was wrong.'

"Suppose, now, an insane man does an act which he knows to be contrary to law, because from an insane delusion (if that term amounts to anything more than the single term insanity) he believes it to be right notwithstanding the law, that the law is wrong, or that the peculiar circumstances of the case make it right for him to disregard it in this instance: how are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand. . . .

"The answer to the fourth question introduces a doctrine which seems to me very remarkable, to say the least. The question was: 'If a person, under an insane delusion as to existing facts, commits an offense, is he thereby excused?' To which the answer was as follows: 'On the assumption that he labors under partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts, with respect to which the delusion exists, were real. For example: if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defense, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character or fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.'

b. The Result Examined.—"The doctrine thus promulgated as law has found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenious student of the law ever read it for the first time without being shocked by

its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving rein to an instinct of self-preservation, and would not be crime. It is true, in words, the judges attempt to guard against a consequence so shocking, as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and is not in other respects insane.' That is, if insanity produces the false belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or disease. This is very refined. It may be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula, or, if no such case has never yet existed, it is doubtless within the scope of omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that, although the false belief on which the prisoner acted was the product of mental disease, still, that the mind was in no other way impaired or affected, and that the motive to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong, but it is a rule which can be safely applied in practice, that we are seeking, and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted, is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to

be true, and which, if it were true, would not be law, but pure matter of fact. No such distinction ever can or will be drawn in practice; and the absurdity as well as inhumanity of the rule seems to me sufficiently apparent without further comment.

c. Worthlessness of the Conclusion Shown.—"To form a correct estimate of the value of these answers, we have only to suppose that, at the end of a criminal trial where the defense is insanity, they be read to the jury for their guidance in determining the question with which they are charged. Tried by this practical test, it seems to me they utterly fail; and the reason of the failure, as I think, is, that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

"The efforts of text-writers to extract a rule from the cases have not, in my judgment, been more successful. See 1 Russell Crimes, 13; Roscoe, Crim. Ev. 944."

American jurisprudence has of necessity been powerfully influenced by English models, especially in the formative period of its existence, where a compressed abstract of some English case was considered absolutely essential to impart a base of respectability and legal parentage to the decision. It followed, as obviously it must, that many of these early cases are beyond the countenance of either precedent or statute, and are besieged by errors ancient, inveterate, traditional and accidental, but all characteristic of their origin. The obstinacy with which some of our early jurists contended against the legal innovation upon accredited methods induced them to carry to the verge of eccentric caprice every dictum that had an alleged or reputed claim to English antecedents. And while it is true that this Anglo-maniac subserviency has largely passed away, traces of its early ascendancy are still discernible in the lax and illogical reasonings that led to the indorsement of the *McNaghten Case*.

The only astonishment is that the reaction should have been so long delayed. There was nothing whatever in the early training of an English judge bred in the era of George IV., that would impart the least respect to his opinions upon a profound and perplexing problem involving erethistic conditions but imperfectly understood even by the most advanced psychologists.

It was never a proper proposition for the judges and no other

debating club at Rugby or Eaton would ever have thought of establishing a precedent by such means.

d. Practical Repudiation of the McNaghten Case by English Jurists.—So great, it may be added, are the embarrassments growing out of the old rule, as expounded by the judges in the House of English Lords, that in March, 1874, a bill was brought before the House of Commons, supposed to have been draughted by the learned counsel for the queen, Sir Fitzjames Stephen, which introduced into the old rule the new element of an absence of the power of self-control, produced by diseases affecting the mind; and this proposed alteration of the laws was cordially recommended by the late *Chief Justice* Cockburn, his only objection being that the principle was proposed to be limited to the case of homicide. 1 Whart. Am. Crim. L. (9th ed.) p. 66, § 45, note 1; Browne, *Insanity*, § 10, note 1; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

If we leave the English rule, where it seems to be left by these authorities, I think an examination of the American cases will not lead to any more satisfactory result.

§ 404. **Early Views of the Massachusetts Court.**—In *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, Shaw, *Ch. J.*, instructed the jury that “a person is not responsible for any criminal act he may commit, if, by reason of mental infirmity, he is incapable of distinguishing between right and wrong in regard to the particular act, and of knowing that the act itself will subject him to punishment; or has no will, no conscience, or controlling mental power; or has not sufficient power of memory to recollect the relations in which he stands to others, and in which they stand to him or has his reason, conscience and judgment so overwhelmed by the violence of disease as to act from an uncontrollable impulse.”

Here seems to be four distinct tests. The first is substantially that given by Lord Denman in *Reg. v. Oxford*, 9 Car. & P. 525, but with one most important qualification added, namely, knowledge that the act will subject him to punishment. But how can it be said that such knowledge constitutes one of the links in a chain of conclusive evidence, that it is one fact in a chain of facts from which that degree of insanity which will excuse a person from crime is to be conclusively found?

If that be so, then certainly a legal quality, effect or significance is given to it by its position in the chain, which no one would

ever think it possessed when standing alone. The desire for revenge may be so strong as to outweigh the fear of a punishment which a man without any mental disease knows must follow his act. But the rule is, that, in addition to the knowledge of right and wrong in respect to the particular act, the accused must have been capable of knowing that the act itself would subject him to punishment.

It is, doubtless, true that ability to know that a certain act will be followed by punishment, furnishes evidence of the mental condition. So would knowledge of any other fact in law or science. But I can see no more reason for holding that such knowledge is any part of a legal test of capacity to commit crime, than for holding that knowledge of the cause of an eclipse is entitled to the same effect.

The second rule relates to a case where there can be no doubt, where the will, the conscience and the controlling mental power are all gone; and the fourth is substantially the same, where the reason, conscience and judgment are so overwhelmed by the violence of disease, that he acts from uncontrollable impulse. There can be no very appreciable legal distinction between a person who has no will, no conscience, or controlling mental power, and one whose reason, conscience and judgment are so overwhelmed by the violence of disease as to act from an uncontrollable impulse. In both cases it is an act in which reason, conscience, judgment and will do not participate; in a word, it is the product of mental disease.

Power of memory sufficient to recollect the relations in which he stands to others and in which others stand to him, which is given as the third test, seems to me no more a legal criterion than power of memory to recollect any other fact which a healthy mind would be expected to remember, and such power of memory or its lack would be a fact, like other facts, for the jury to weigh in judging whether he had the mental capacity to entertain a criminal intent.

There is no doubt but these instructions of the learned and eminent chief justice of Massachusetts have been largely followed in cases since tried in this country, but the course has been by no means uniform, as we shall see.

§ 405. **New York and Pennsylvania Cases Considered.**—In New York and Pennsylvania, in the two leading cases of

Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216, and *Com. v. Mosler*, 4 Pa. 267, capacity to distinguish right from wrong was given as the naked test. But in neither of those states has the rule thus laid down been followed with uniformity. In the trial of Huntington for forgery, in New York City, in 1856, Judge Capron said to the jury: "To constitute a complete defense, insanity, if partial, as monomania, must be such in degree as to wholly deprive the accused of reason in regard to the act with which he is charged, and of the knowledge that he is doing wrong in committing it." And the remarks of Edmonds, *J.*, in the earlier case of *People v. Kleim*, 1 Edm. Sel. Cas. 13, are wholly at war with any such rule as that promulgated in *Freeman v. People*, *supra*. He says: "The moral as well as the intellectual faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power, and that he must know the act to be wrong and punishable, and be able to compare and choose between doing it and not doing it."

In Pennsylvania, in *Com. v. Knepley* (1850) knowledge of right and wrong in regard to the particular act was given as the test; and in *Com. v. Haskell*, 2 Brewst. 491, the judge charged that "the true test lies in the word 'power.' Has the defendant, in a criminal case, the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"

It would probably not be far out of the way to say that the number of American cases where knowledge of right and wrong in the abstract, and knowledge of the nature and quality of the act—that it was wrong—have been given as the test, is about equal to the tendency of late years to the latter form, while it will appear that, in almost every case where any rule has been given on the subject, it has been modified and explained to meet the facts of the particular case, or to carry out the personal views of the judge on the matter of insanity.

§ 406. Instances where all Tests have been Discarded.—

But there are not wanting cases where all tests have been discarded. In *State v. Felter*, 25 Iowa, 67, Dillon, *Ch. J.*, says: "The jury, in substance, should be told that if the defendant's act in taking the life of his wife was accused of mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of that act, and which, overpowering

his will, irresistibly forced him to its commission, then he is not amenable to legal punishment. But if the jury believe, from all the evidence and circumstances, that the defendant was in possession of a rational intellect and sound mind, and allowed his passions to escape control, then, though passion may for the time being have driven reason from her seat and usurped it, and have urged the defendant, with a force at the moment irresistible, to desperate acts, he cannot claim for such acts the protection of insanity." And in *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634, 9 Am. Reg. N. S. 530, which was an indictment for murder, and the defense insanity, an instruction to the jury that, if they believed the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, he was responsible, was held erroneous.

In the course of his opinion in that case, Gregory, *J.*, speaking of the charge in *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, said: "It is by no means clear, and we think it is not entitled to the weight usually awarded it."

Very much to the same effect was *State v. Spencer*, 21 N. J. L. 196, Hornblower, *Ch. J.*, said: "In my judgment the true question to be put to the jury is, whether the prisoner was insane at the time of committing the act, and in answer to that question there is little danger of a jury giving a negative answer, and convicting a prisoner who is proved to be insane on the subject-matter relating to or connected with the criminal act, or proved to be so far or so generally deranged as to render it difficult or almost impossible to discriminate between his sane and insane acts." *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

§ 407. **Delaware Adopts the New Hampshire View.**—The Delaware supreme court, after a struggle with its instincts, adopted the New Hampshire view, and holds that the true test is not, as sometimes laid down, the capacity merely to distinguish between the rightfulness and wrongfulness of the act committed, but also sufficient will power to choose whether he shall do or refrain from doing it. After referring to many cases upon the same subject, the learned judge proceeded to say: "We do not perceive that there is any very great difference in all these cases, the aim of all seeming to be to define a state of mind in which the prisoner is capable of the perception or consciousness of right and

wrong as applied to the act he is about to commit, and has the ability, through that consciousness, to choose, by an effort of the will, whether he will do the deed which he knows to be wrong." In his report of the case, the words quoted are italicised by him to show the approval of the court of the definition of "sanity," which as before said, is knowledge of the rightfulness or wrongfulness of the contemplated action,—the power to decide against doing the wrongful deed. *State v. Reidell* (Del.) May 18, 1888.

§ 408. **The Right and Wrong Test in Formulas.**—There are some *obiter dicta* which would seem to evidence an intention to shroud this doctrine in doubt, or to hamper it with conditions subversive of its clearness and efficacy. There is no occasion however for this obscurity. The rule generally in vogue may be formulated as follows: "The true test of criminal responsibility where the defense of insanity is interposed to an indictment, is whether the evidence shows that the accused had sufficient reason to know right from wrong." Upon this simple test has been engrafted an entirely different proposition. It is this: "and in addition to this knowledge, has he sufficient power of control to govern his actions?" Satisfactory evidence of this last is a difficult matter to obtain. The extent to which a person can control his actions under all the varying impulses aroused by passion, fear, avarice or religious frenzy, is a delicate determination. Frequently to reach a proper conclusion expert medical testimony is required, and such testimony too frequently "leads to bewilder and dazzles to betray."

When an expert is called on to determine whether the mind is diseased to such an extent as to make the person an irresponsible being, the task is much more difficult. Especially is this true where the opinion must be formed and based upon a hypothetical question alone. In such case, it seems to us that the opinion must, of necessity, be mere theory. This is not the fault of the profession, but because more than human intelligence is required to solve the problem.

This right and wrong test has been a persistent subject of attack. Seldom if ever in a capital case is the ingenuity of the counsel for the accused more strenuously exerted than in the attempt to inject into the general defense of insanity the theory, some mysterious pressure to the commission of the acts, the consequence of which he anticipates but cannot avoid.

Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the injury which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it.

Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Every crime was committed under an influence of such a description, and the object of the law is to compel people to control these influences. The doctrine of irresponsibility for a crime committed by a person who had sufficient mental capacity to comprehend the nature and quality of his act, and to know that it was wrong, on the ground that he had not the power to control his action, has not met with favor in the adjudications in the state of New York. *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731.

§ 409. **Liberal Views of the Alabama Supreme Court.**—I shall elaborate the treatment of this subject with the following extended extracts from the exceptionally able opinion of *Mr. Justice Somerville* in *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193. Taken together with the dissenting opinion of *Chief Justice Stone* in the same case, there is a presentation of the topic under review, that seems to exhaust the subject. Few opinions even from this able court are so freighted in logical exposition, keen and discriminating analysis, extended collation of authority and scholarly research. Especially is this true when we reflect that of all medico-legal questions those connected with insanity are the most difficult and perplexing. *State v. Felter*, 25 Iowa, 67.

Judge Somerville says: "We do not hesitate to say that we reopen the discussion of this subject with no little reluctance, having long hesitated to disturb our past decisions on this branch of the law. Nothing could induce us to do so except an imperious sense of duty, which has been excited by a protracted investigation and study, impressing our minds with the conviction that the

law of insanity as declared by the courts on many points, and especially the rule of criminal accountability, and the assumed tests of disease, to that extent which confers legal irresponsibility, have not kept pace with the progress of thought and discovery in the present advanced stages of medical science. Though science has led the way, the courts of England have declined to follow, as shown by their adherence to the rulings in *McNaghten's Case*, 10 Clark & F. 200, emphasized by the strange declaration made by the lord chancellor of England, in the house of lords, on so late a day as March 11, 1862, that 'the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease.'

a. **As to Medical Experts.**—"It is obvious that the courts cannot upon any sound principle undertake to say what are the invariable or infallible tests of such disease. The attempt has been repeatedly made, and has proved a confessed failure in practice. 'Such a test,' says Mr. Bishop, has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist.' 1 Bishop, Crim. L. (7th ed.) § 381. In this conclusion, Dr. Ray, in his learned work on the medical jurisprudence of insanity, fully concurs. Ray, *Insanity*, 39. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike. 'The fact of its existence,' says Dr. Ray, 'is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case.' Ray, *Insanity*, § 24. Its exciting causes being moral, psychical and physical, are the especial subjects of specialists' study. What effect may be exerted on the given patient of age, sex, occupation, the seasons, personal surroundings, hereditary transmission and other causes, is the subject of evidence based on investigation, diagnosis, observation and experiment. Peculiar opportunities, never before enjoyed in the history of our race, are offered in the present age for the ascertainment of these facts, by the establishment of asylums for the custody and treatment of the insane, which Christian benevolence and statesmanship have substituted for jails and gibbets. The testimony of these experts (differ as they may in many doubtful cases) would seem to be the best which can be obtained, however unsatisfactory it may be in some respects. . . .

"In Bucknill on Criminal Lunacy, page 59, it is asserted as 'the result of observation and experience, that in all lunatics, and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist.'

"'With regard to this test,' says Dr. Russell Reynolds, in his work on the Scientific Value of the Legal Tests of Insanity (London, 1872), p. 34, 'I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature.'

"In the learned treatise of Drs. Bucknill and Tuke on Psychological Medicine (4th ed. London, 1879), p. 269, the legal tests of responsibility are discussed, and the adherence of the courts to the right and wrong test is deplored as unfortunate, the true principle being stated to be, 'whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible.' It is observed by the authors: 'As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness through cerebral defect or disease to do right is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows.'

"Dr. Peter Bryce, superintendent of the Alabama Insane Asylum for more than a quarter century past, alluding to the moral and disciplinary treatment to which the insane inmates are subjected, observes: 'They are dealt with in this institution, as far as it is practicable to do so, as rational beings; and it seldom happens that we meet with an insane person who cannot be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society.' Sixteenth Annual Report Alabama Insane Hospital (1876) p. 22; Biennial Report (1886) pp. 12-18.

"Other distinguished writers on the medical jurisprudence of insanity have expressed like views, with comparative unanimity. And nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country. A notable instance is found in the following resolution unanimously passed at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held

in London, July 14, 1864, where there were present fifty-four medical officers :

“*Resolved*, That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions.’ Ordronaux, *Judicial Aspects of Insanity* (1877) 423, 424.

“These testimonials as to a scientific fact are recognized by intelligent men in the affairs of every-day business, and are constantly acted on by juries. They cannot be silently ignored by judges. Whether established or not, there is certainly respectable evidence tending to establish it, and this is all the courts can require.

“Nor are the modern law writers silent in their disapproval of the alleged test under discussion. It meets with the criticism or condemnation of the most respectable and advanced in thought among them, the tendency being to incorporate in the legal rule of responsibility ‘not only the knowledge of good and evil, but the power to chose the one and refrain from the other.’ Browne, *Insanity*, §§ 13, 18, *et seq.*; Ray, *Insanity*, §§ 16–19; Whart. & S. *Medical Jurisprudence*, § 59; 1 Whart. *Am. Crim. L.* (9th ed.) §§ 33, 43, 45; 1 Bishop, *Crim. L.* (7th ed.) § 386, *et seq.*; Ordronaux, *Judicial Aspects of Insanity* (1877) 419; 1 Greenl. *Ev.* § 372; 1 Stephen, *Hist. Crim. L.* § 168; 4 *Am. L. Rev.* 236, *et seq.*”

b. But Three Questions for the Jury.—In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly from what we have said, that the inquiries to be submitted to the jury then, in every criminal trial where the defense of insanity is interposed, are these:

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be

legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

c. Modification of the Rule in Boswell's Case.—The rule announced in *Boswell v. State*, 63 Ala. 308, 35 Am. Rep. 20, is in conflict with the foregoing conclusions, and to that extent is declared incorrect, and is not supported by the opinion in that case otherwise than by *dictum*.

We adhere however to the rule declared by this court in *Boswell's* case, and followed in *Ford v. State*, 71 Ala. 385, holding that when insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

d. "Right and Wrong" Test Denounced.—The leading writers on medical jurisprudence and insanity do not look with favor on the right and wrong test. See Wharton & Stillé, Beck, Dean, and Taylor's works on Medical Jurisprudence, Ray on Insanity, and Browne on Medical Jurisprudence of Insanity.

The American authorities differ somewhat, and in most cases very widely.

In *People v. Kleim*, an early case in this state, Judge Edmonds charged the jury: "If some controlling disease was in truth the acting power within him, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted him, he is not responsible. But it must be an absolute dispossession of the free and natural agency of the mind. . . . If he have not intelligence enough to have a criminal intent and purpose, and if his moral and intellectual powers are either so deficient that he has not sufficient will, conscience or controlling mental power, or if, through the overwhelming violence of mental diseases, his intellectual power is for the time obliterated, he is not a responsible moral agent." *People v. Kleim*, 1 Edm. Sel. Cas. 13.

"The question will be whether the disease existed to so high a degree that for the time being it overwhelmed the reason, con-

science and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it." *Com. v. Rogers*, 1 Bennett & Heard, Lead. Crim. Cas. (2d ed.) 87, 7 Met. 500, 41 Am. Dec. 458. See *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Cole's Case*, 7 Abb. Pr. N. S. 321.

In *People v. McFarland*, 8 Abb. Pr. N. S. 57, Recorder Hackett defined the state of sanity of a party who is accused of a criminal act to be that in which a man knows the act he is committing to be unlawful and morally wrong and he has not reason sufficient to apply such knowledge, and to be controlled by it;" "and the state of insanity in a similar case as that in which a man does not know the act he is committing to be unlawful and morally wrong, and he has not reason sufficient to apply such knowledge, and to be controlled by it." *People v. McFarland*, *supra*. See also *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642 (prisoner entitled to an acquittal if there be a reasonable doubt as to his sanity); *Com. v. Mosler*, 4 Pa. 267 (where the court recognizes homicidal insanity as an excuse for crime). See *Huntingdon's Case*, pamphlet.

In the case of *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634, the supreme court of that state held that where a person is moved to the commission of an unlawful act by an insane impulse controlling his will and his judgment, he is not guilty of a crime, and the court held to be erroneous a charge to the jury that if they believed from the evidence "that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the state, then he is responsible for his acts."

In the important case of *Smith v. Com.* 1 Duv. 225, the court, after a very exhaustive discussion of the subject of insanity, held to be correct an instruction to the jury that "the true test for responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions." This instruction which was taken from the case of *Graham v. Com.* 16 B. Mon. 591, and approved by the Kentucky court of appeals, is the precise request which in the above case the recorder refused to charge the jury.

"The true test lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong. Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body and his estate." *Com. v. Haskell*, 2 Brewst. 491, 4 Am. L. Rev. 240. See also *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, 4 Am. L. Rev. 245.

The result is that the "right and wrong test," as it is sometimes called, which, it must be remembered, itself originated with the medical profession in the mere dawn of the scientific knowledge of insanity, has been condemned by the great current of modern medical authorities, who believe it to be "founded on an ignorant and imperfect view of the disease." 15 Enc. Brit. (9th ed.) title *Insanity*; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

e. Rule of the French and German Criminal Codes Stated.

—The Code of France provides: "There can be no crime or offense if the accused was in a state of madness at the time of the act." For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country.

The criminal code of Germany contains the following provision which is said to have been the formulated result of a very able discussion by both the physicians and lawyers of that country: "There is no criminal act when the actor at the time of the offense is in a state of unconsciousness, or morbid disturbance of the mind, through which the free determination of his will is excluded." 9 Enc. Brit. (9th ed.), citing *Crim. Code, Germany*, § 51, R. G. B. *Parsons v. State*, *supra*.

f. Dissenting Views of Chief Justice Stone.—*Chief Justice* Stone in his dissenting opinion in this highly instructive case of *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, *note*, summarizes his views on this question of insanity as follows:

"1. Insanity, when relied on as a defense to a prosecution for crime, is a mixed question of law and fact.

"2. It is a perfect defense to an accusation of crime, if the accused, at the time he committed the act, was afflicted with a mental disease to such extent as to render him incapable of determining between right and wrong, or of perceiving the true nature and quality of the act done.

"3. When it is satisfactorily shown that the accused was mentally diseased at the time he did the act charged as an offense, and that he did the act in consequence solely of such mental disease, without which it would not have been done, this is a complete defense, even though the defendant knew the act was wrong.

"4. When at the time of committing the act charged, the defendant was laboring under a disease of the mind, known as delusion, illusion, or hallucination, and the act done was solely the result of such mental disease, connected with and growing out of it as effect follows cause, and without which the act would not have been done, the defendant should be acquitted on the plea of insanity. Whart. Crim. Ev. § 336; 2 Greenl. Ev. § 372.

"5. No form of moral or emotional insanity is a defense against criminal accusation.

* * * * *

"I differ with my brother Somerville in the interpretation of some of the legal authorities he relies on as supporting his views, and as to others, in the estimate he places upon them as authority. This court has repudiated the doctrine of moral insanity as a defense for conduct otherwise criminal; and we hold that insanity is a defense to be affirmatively established by proof. It is not enough that a reasonable doubt of sanity is engendered. *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Ford v. State*, 71 Ala. 385. Of the judicial authorities relied on by him, the following cases hold that the defense of insanity is made good, if the testimony raises a reasonable doubt of its existence. Some of them go so far as to hold that when any evidence of insanity is produced, the burden is then cast on the prosecution to establish sanity beyond a reasonable doubt. *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Bradley v. State*, 31 Ind. 492; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Cunningham v. State*, 56 Miss. 269, 21 Am. Rep. 360; *State v. Johnson*, 40 Conn. 136."

The learned judge proceeds to dissect the cases bearing upon the subject, and the practitioner who is confronted with any problem associated with the topic of insanity would do well to consult the following cases: *State v. Felter*, 25 Iowa, 68; *State v. Hockett*, 70 Iowa, 442; *Hopps v. People*, *supra*; *Dunn v. People*, 109 Ill. 635; *Chase v. People*, 40 Ill. 353; *Bradley v. State*, 31 Ind. 492; *Walker v. State*, 102 Ind. 502; *Harris v. State*, 18 Tex. App. 287; *Smith v. Com.* 1 Duv. 224; *Kriel v. Com.* 5 Bush, 362; *Cun-*

ningham v. State, 56 Miss. 269, 21 Am. Rep. 360; *United States v. McGlue*, 1 Curt. C. C. 1; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Dejarnette v. Com.* 75 Va. 867; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *State v. Johnson*, *supra*; *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669; *State v. Hoyt*, 46 Conn. 330; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Mowry*, 37 Kan. 369; *State v. Nixon*, 32 Kan. 205; *State v. Pagers*, 92 Mo. 300.

g. A Cautionary Paragraph.—I cannot leave this highly important subject without a cautionary paragraph. It must be steadily borne in mind, that great contradiction prevails in the judicial comment; and notwithstanding repeated adjudication from very able courts, this contradiction is far from even suggesting ultimate harmony. The elaborate and ingenious argument of *Judge Somerville* is based upon critical study of the subject, and is a very plausible presentation of the case. We should avoid the least tendency to generate an animosity fatal to a just estimate of either as it is from the coalescence of antagonistic ideas, each containing its modicum of truth that there arises a higher development and a more perfect law.

§ 410. **The Problem Considered by Dr. Ordronaux.**—"A series of decisions develop the doctrine that insanity must be established by a preponderance of evidence, although not necessary to be established beyond a reasonable doubt. This qualification softens somewhat the rigor of the original rule, but does not relieve it entirely of its injustice. A preponderance of evidence in relation to establishing a matter of inference even, as in the case of establishing such inference beyond a reasonable doubt, is a conclusion quite as difficult for a jury to arrive at as any other disputed fact about which no positive proof can be adduced. A party's insanity is inferred by one set of experts; it is denied by another—both sets drawing their conclusions from the same premises, but each under a different angle of vision. Suppose there are seven experts called, three of whom testify to sanity and four to insanity in the prisoner. How much shall those three, added to the general presumption of sanity, weigh as against the four?"

"This problem of what constitutes a preponderance of evidence in favor of insanity will be found full of uncertainties and hedged about with doubts on every side. Its complete solution always involves the necessity of reasoning more or less in a circle, and,

besides, it opens the door to a mass of speculative testimony whose chief mission would seem to be the diffusion of useless knowledge and the confusion of the human understanding.

"A very recent and decided reaction has accordingly been taking place against this attempt to formularize the sources of human intellection, so as to reduce human conduct to a personal equation born alone of flesh and chemical forces. And courts have, through sheer weariness and despair of both physical and metaphysical formulæ, as keys to this mental riddle, begun to adopt rules of kindred evidence, in issues of insanity, to those adopted in other matters involving presumptions of human guilt. Hence if there be a reasonable doubt of a defendant's guilt, the jury must acquit, and if, by a parity of reason, there be a reasonable doubt of his sanity, they must, in like manner, acquit." *

From a report of commissioners in lunacy appointed under a special commission by Governor Dix, the evidence in favor of a confessed murderer was to the effect that, through the influence of his epileptic constitution, and the grossest practice of self-abuse, his brain was in a state of continuous erethism. His mind has not enough intensity of power to localize itself upon any one idea or to perform acts of self-introspection. Disease has degraded him too far for that. He has an unsteady gait, and otherwise reveals obscure symptoms of that form of paralysis known as locomotor ataxy. He could not, therefore, be said to have yet arrived at that condition of diathetic permanency necessary to constitute complete insanity at law. He simply exhibited a form of imbecility, based upon an epileptic diathesis, in which strong animal propensities might bring on at any moment a convulsion, both mental as well as bodily.

Upon this statement of facts, and under the necessities of the legal conditions surrounding the prisoner, the governor commuted his sentence to imprisonment for life. *Re Stauderman*, 3 Abb. N. C. 191; *People v. Beno Ville*, 3 Abb. N. C. 195.

*NOTE.—The above extract is from an able article by John Ordranax, M. D., for many years the New York State Commissioner in Lunacy, and Professor of Medical Jurisprudence in the Law School at Columbia College. The article was first published in volume 1 Criminal Law Magazine, p. 31, under the title of "The Plea of Insanity as an Answer to an Indictment." It is a suggestive and philosophic review of an obscure and confusing topic, and will well merit perusal, both for the information that it contains, and the research that it stimulates.

§ 411. **The Guiteau Case Examined.**—The most exhaustive review of modern criminal law fails to disclose a case of more absorbing interest, or one in which the entire technique of legal science in this specialized branch has been more effectively displayed, than in a celebrated trial of President Garfield's assassin. The rulings of *Judge Cox* on that occasion will ever be regarded as safe expositions of the modern law regulating one side of this controversy, and as epigrammatic statements of fundamental rules, that underlie and support the entire fabric of criminal jurisprudence. His introductory remark:—"No one can feel more keenly than I do the grave responsibility of my duty; and I feel that I can only discharge it by a close adherence to the law as it has been laid down by its highest authorized expounders,"—will sufficiently indicate the temper with which he approached the task of charging the jury; and those acquainted with his scholarly attainments, his wide research in criminal law and unrivaled felicity of judicial expression, will appreciate and commend the contribution he has made to this branch of our jurisprudence. The following extracts are elucidative of the topic under review, and are taken from that celebrated charge.

a. Abuse of Insanity as a Defense.—The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse of juries for acquittal, when their own and the public sympathy have been with the accused, and especially when the provocation to homicide has excused it according to public sentiment but not according to law. For these reasons, it is viewed with suspicion and disfavor, whenever public sentiment is hostile to the accused. Nevertheless, if insanity be established to the degree that has been already, in part, and will hereafter further be explained, it is a perfect defense to an indictment for murder, and must be allowed full weight.

A man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offenses, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever, he may be subject to some delusion.

That subtle essence which we call "mind" defies, of course, ocular inspection. It can only be known by its outward manifestations, and they are found in the language and conduct of the man. By these his thoughts and emotions are read, and according as they conform to the practice of people of sound mind, who form the large majority of mankind, or contrast harshly with it, we form our judgment as to his soundness of mind. For this reason evidence is admissible to show conduct and language at different times and on different occasions, which indicate to the general mind some morbid condition of the intellectual powers; and the more extended the view of the person's life the safer is the judgment formed of him. Everything relating to his physical and mental history is relevant, because any conclusion as to his sanity must often rest upon a large number of facts. As a part of the language and conduct, letters spontaneously written afford one of the best indications of mental condition.

b. Evidence of Insanity in Parents and Immediate Relatives.—Evidence as to insanity in the parents and immediate relatives is also pertinent. It is never allowed to infer insanity in the accused from the mere fact of its existence in the ancestors. But when testimony is given directly tending to prove insane conduct on the part of the accused, this kind of proof is admissible as corroborative of the other. And therefore it is that the defense have been allowed to introduce evidence covering the whole life of the accused, and reaching to his family antecedents.

A jury is not warranted in inferring that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or from the mere apparent absence of adequate motive for it, for the law assumes that there is a bad motive—that it is prompted by malice—if nothing else appears.

c. Legitimate Conclusions from the Evidence.—The jury was to draw its conclusions from the evidence. Was the ordinary, permanent, chronic condition of his mind such, in consequence of disease, that he was unable to understand the nature of his actions or to distinguish between right and wrong in his conduct? Was he subject to insane delusions that destroyed his power of so distinguishing? And did this continue down to and embrace the act for which he is tried? If so, he was simply an irresponsible lunatic.

Or, on the other hand, had he the ordinary intelligence of sane people, so that he could distinguish between right and wrong, as to his own actions? If another person had committed the assassination, would he have appreciated the wickedness of it? If he had had no special access of insanity impelling him to it, as he claims was the case, would he have understood the character of such an act and its wrongfulness if another person had suggested it to him? If you can answer these questions in your own minds it may aid you towards a conclusion as to the normal or ordinary condition of the prisoner's mind before he thought of this act; and if you are satisfied that his chronic or permanent condition was that of sanity, at least so far that he knew the character of his own actions, and whether they were right or wrong, and was not under any permanent insane delusions which destroyed his power of discriminating between right and wrong as to them, then the only inquiry remaining is whether there was any special insanity connected with this crime; and what I shall further say will be on the assumption that you find his general condition to have been that of sanity to the extent I have mentioned.

d. The McNaghten Case again Reviewed.—As a part of the history of judicial sentiment on this subject, and by way of illustrating the relation between insane delusions and responsibility, I will refer to the celebrated case in English history already freely commented on in argument. Nearly 40 years ago one McNaghten was tried in England for killing a Mr. Drummond, private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the house of lords addressed certain questions to the judges of the superior courts of England in regard to the law of insanity in certain cases, and their answers have been since regarded as settling the law on this subject in England, and, with some qualification, have been approved in the courts of this country. One of the questions was: "If a person, under an insane delusion as to the existing facts, commits an offense in consequence thereof, is he thereby excused?"

To which it was answered, that—

"In case he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with regard to which the delusion exists were real. For example, if under the influence of his

delusion he supposes another man to be in the act of attempting his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

This was because it was excusable to kill in self-defense, but not to kill in revenge for an injury.

This has been in part recognized as law in this country.

Thus *Chief Justice Shaw*, of Massachusetts, in the case of *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, says:

e. Monomaniac and Insane Delusions Considered.—"Monomania may operate as an excuse for a criminal act," when the "delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as when the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense. A common instance is, where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

But the insane delusion, according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual. A man, with no reason for it, believes that another is attempting his life, or that he himself is the owner of untold wealth, or that he has invented something which will revolutionize the world, or that he is president of the United States, or that he is God or Christ, or that he is dead, or that he is immortal, or that he has a glass arm, or that he is pursued by enemies, or that he is inspired by God to do something.

In most cases, as I understand it, the fact believed is something affecting the senses. It may also concern the relations of the party with others. But generally the delusion centers around himself, his cares, sufferings, rights and wrongs. It comes and goes independently of the exercise of will and reason, like the phantasms of dreams. It is, in fact, the waking dream of the

insane, in which facts present themselves to the mind as real, just as objects do to the distempered vision in delirium tremens.

The insane delusion does not relate to mere sentiments or theories or abstract questions in law, politics, or religion. All these are the subjects of opinions, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism, and other like matters, to a degree that seems unreason itself, to most other people. And there is no absurdity in relation to religious, political, and social questions that has not its sincere supporters.

These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be changed by better external evidence of sounder reasoning. But they are not insane delusions.

f. Unsworn Declarations of the Accused.—The prisoner's unsworn declarations, since the assassination, on this subject, in his own favor, are, of course, not evidence, and are not to be considered by you. A man's language, when sincere, may be evidence of the condition of his mind when it is uttered, but it is not evidence in his favor of the facts declared by him, or as to his previous acts or condition. He can never manufacture evidence in this way in his own exoneration.

It is true that the law allows a prisoner to testify in his own behalf, and thereby makes his sworn testimony on the witness stand legal evidence, to be received and considered by you, but it leaves the weight of that evidence to be determined by you also.

I need hardly to say to you that no verdict could safely be rendered upon the evidence of the accused party only, under such circumstances. If it were recognized, by such verdict, that a man on trial for his life could secure an acquittal by simply testifying himself, that he had committed the crime charged under a delusion, an inspiration, an irresistible impulse, this would be to proclaim in universal amnesty to criminals in the past, and an unbounded license for the future, and the courts of justice might as well be closed.

It must be perfectly apparent to you that the existence of such

a delusion can be best tested by the language and conduct of the party immediately before and at the time of the act.

And while the accused party cannot make evidence for himself by his subsequent declarations, on the other hand, he may make evidence against himself, and, when those declarations amount to admissions against himself, they are evidence to be considered by a jury.

And I have dwelt upon the question of insane delusion, simply because evidence relating to that is evidence touching the defendant's power, or want of power, from mental disease, to distinguish between right and wrong, as to the act done by him, which is the broad question for you to determine, and because that is the kind of evidence on this question which is relied on by the defense.

g. The Test of Criminal Responsibility.—But the only safe rule for you is to direct your reflections to the one question which is the test of criminal responsibility, and which has been so often repeated to you, viz: whether, whatever may have been the prisoner's singularities and eccentricities, he possessed the mental capacity, at the time the act was committed, to know that it was wrong, or was deprived of that capacity by mental disease.

Hence the importance of viewing the moral as well as intellectual side of the man, in the effort to solve the question of sanity. That evidence on this subject is proper was held by the supreme judicial court of New Hampshire in *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242, *Judge Ladd* said:

"The history of the defendant and evidence of his conduct at various times during a period of many years before the act for which he was tried, tending to show his temper, disposition, and character, were admitted against his objection. It was for the jury to say whether the act was the product of insanity, or the naturally malignant and vicious heart. The condition of the man's mind, whether healthy or diseased, was the very matter in issue. This must be determined in some way or other from external manifestations as exhibited in his conduct. To know whether an act is the product of a diseased mind it is important to ascertain, if possible, how the same mind acts in a state of health. The condition of sanity or insanity shown to exist at one time is presumed to continue. For these reasons and others, which I have not thought it necessary to enlarge upon, it would seem that evidence to show defendant's mental and moral charac-

ter and condition for many years before the act, was properly received."

The London *Lancet* of December 12, 1881, a periodical well known to the medical profession of both England and America commenting upon insanity as a defensive plea refuses to admit the theory of moral insanity and denies it the least professional countenance. The writer says: "We fancied the 'plea of insanity' had been reduced to absurdity in the ridiculous attempt made to show that Lefroy was insane; but it seems that the apotheosis of stupidity is to take place in America. It is high time the nonsense recently talked and written about 'irresponsibility' should be exposed and ended. If the supreme triumph of medical psychology is to be sought in the attempt to prove that men are mere machines, and that the wrong they do is not their doing, but the outcome of disease, the sooner this branch of science is discountenanced by the common sense of the profession the better will it be for the credit and influence of our cloth. If a man is not acting under a recognizable and formulated delirium when he commits a crime, he is clearly responsible, and ought to be so held unless he is unquestionably, and on grounds other than those arising out of or associated with his crime, shown to be insane. The mistake into which 'experts' and those who follow their lead commonly fall is to confound the evidences of a neurotic constitution with the symptoms of mental disease. The inheritor of an organism which predisposes to insanity is not necessarily insane. Lefroy was not insane, and Guiteau is not insane. The only insanity accruing to the latter case is that which those who support the plea may themselves import into it. The position of matters in regard to this question is becoming one of exceeding gravity, and it will soon need to be very seriously discussed."

h. Theory of Irresistible Impulse Examined.— "Irresistible impulse," to constitute a defense, must be that of a person otherwise insane, we proceed to consider the authorities that establish such impulse, under such conditions, as a defense. In doing so it must be, at the outset, conceded that, by the English courts, this defense, as here stated, is rejected. No person, however insane, can, by the law as now (1882) expounded by these courts, be acquitted of a crime if it appear to the satisfaction of the jury that he knew the nature and quality of the act he was doing, or, if he did not know it, if he knew that the act was

wrong. But if, as may readily be shown, it is demonstrable that there sometimes is, among insane persons, an "irresistible impulse" to an act co-existing with a knowledge that it was wrong then comes the question whether lunatics of this stamp are legally punishable for such acts. That they are not, the tendency of American authority is to maintain. And even in England we find Mr. Stephen, in his work on English Criminal Law (London, 1863) p. 91,—a work as remarkable for philosophical symmetry as for legal accuracy,—stating (1863) the questions to be, "in popular language, Was it his act? Could he help it? Did he know it was wrong?" He goes on further to say: "It would be absurd to deny the possibility that such (irresistible) impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt, and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice, is whether the particular impulse in question was irresistible as well as unresisted. If it were irresistible the person accused is entitled to be acquitted, because the act was not voluntary, and was not, properly, his act. If the impulse was irresistible, the fact that it proceeded from disease is no excuse at all." See *People v. McFarland*, 8 Abb. Pr. N. S. 57. In Sir J. Stephen's testimony before the English homicide committee the same view is taken. Whart. Am. Crim. L. (8th ed.) § 45.

i. Review of the State Decisions.—In Illinois, in 1863, it was declared by the supreme court that a safe and reasonable test would be, that whenever it should appear from the evidence that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he should be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, justice and humanity alike demand an acquittal. Sound mind is presumed if the accused is neither an idiot, a lunatic, nor "affected with insanity." If he be

insane, sound mind is wanting, and the crime is not established; therefore, the burden is on the state to establish sanity, and not upon the prisoner to show insanity. See *Fisher v. People*, 23 Ill. 283; *Hopps v. People*, 31 Ill. 394, 83 Am. Dec. 231. So, also, Judge Brewster, speaking for the judges of the Philadelphia common pleas, said, in 1868: "The true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right and wrong, and the power to adhere to the right and avoid the wrong?" *Com. v. Haskell*, 2 Brewst. 491.

In Indiana a similar view was accepted in 1869. *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634.

In Ohio insane irresistible impulse is regarded as a defense (*Blackburn v. State*, 23 Ohio St. 146) and such is the view in Minnesota and Kentucky. *Smith v. Com.* 1 Duv. 224. In Iowa, in 1868, the same point was affirmed by the supreme court, Chief Justice Dillon delivering the opinion. The capacity to distinguish right and wrong, it was held, is not in all cases a safe test of criminal responsibility. If a person commit a homicide, knowing it to be wrong, but driven to it by an uncontrollable and irresistible impulse, arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible. *State v. Felter*, 25 Iowa, 67. See also *People v. McFarland*, 8 Abb. Pr. N. S. 57. To the same effect is a decision of the Supreme Court of the United States in 1872. *Mutual L. Ins. Co. v. Terry*, 82 U. S. 15 Wall. 580, 21 L. ed. 236. See also *Blackburn v. State*, 23 Ohio St. 165; *Brown v. Com.* 78 Pa. 122; and other cases in Whart. Am. Crim. L. (8th ed.) 145.

Thus, in *People v. Coleman*, 1 N. Y. Crim. Rep. 3, Judge Davis charged the jury as follows: "In this state the test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He further said that the question for the jury to determine is "whether at the time of doing the act the prisoner knew what she was doing and that she was doing a wrong; or, in other words, did she know that she was shooting at the deceased, and that such shooting was a wrongful act?" The judge further said: "No imaginary inspiration to do a personal or private wrong, under a delusion, a belief, that some great public benefit

will flow from it, where the nature of the act done and its probable consequences, and that it is in itself wrong, are known to the actor, can amount to that insanity which in law disarms the act of criminality. Under such notions of legal insanity, life, property and rights, both public and private, would be altogether insecure, and every man who, by brooding over his wrongs, real or imaginary, shall work himself up to an irresistible impulse to avenge himself, or his friend or his party, can with impunity become a self-elected judge, jury, and executioner in his own case, for the redress of his own injuries or the imaginary wrongs of his friends, his party, or his country. But, happily, that is not the law, and whenever such ideas of insanity are applied to a given case as the law (as too often they have been) crime escapes punishment, not through the legal insanity of the accused, but through the emotional insanity of courts and juries."

To the same general effect may be cited *Reg. v. Oxford*, 9 Car. & P. 525; *Rex v. Burrow*, 1 Lew. C. C. 238; *Reg. v. Goode*, 7 Ad. & El. 536, 67 Hans. Parl. Deb. 728; *Bowler's Case*, 67 Hans. Parl. Deb. 480; *Rex v. Hadfield*, 67 Hans. Parl. Deb. 480, 27 How. St. Tr. 1282; *Reg. v. Barton*, 3 Cox, C. C. 275; *Reg. v. Oxford*, 5 Car. & P. 168; *Reg. v. Higginson*, 1 Car. & K. 129; *Reg. v. Stokes*, 3 Car. & K. 185; *Reg. v. Layton*, 4 Cox, C. C. 149; *Reg. v. Vaughan*, 1 Cox, C. C. 80; *United States v. Shults*, 6 McLean, 121; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *State v. Richard*, 39 Conn. 591; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *People v. Sprague*, 2 Park. Crim. Rep. 43; *State v. Spencer*, 21 N. J. L. 196; *Com. v. Mosler*, 4 Pa. 264; *Com. v. Farkin*, 2 Pars. Sel. Eq. Cas. 439; *Brown v. Com.* 78 Pa. 122; *State v. Gardiner, Wright*, (Ohio) 392; *Vance v. Com.* 2 Va. Cas. 132; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Dove v. State*, 3 Heisk. 348; *Stuart v. People*, 1 Baxt. 178. Commenting upon the *Guiteau Case*, 10 Fed. Rep. 194, *Mr. Justice Somerville* of the Alabama supreme court says:

j. Comments of Judge Somerville.—"The Guiteau case was tried before the United States district court for the District of Columbia, before *Mr. Justice Cox*, whose charge to the jury is replete with interest and learning. While he adopted the right and wrong test of insanity, he yet recognized the principle that if the accused in fact entertained an insane delusion, which was

the product of the disease of insanity, and not of a malicious heart and vicious nature, and acted solely under the influence of such delusion, he could not be charged with entertaining a criminal intent. An insane delusion was defined to be "an unreasonable and incorrigible belief in the existence of facts which are either impossible absolutely, or impossible under the circumstances of the individual;" and no doubt the case was largely determined by the application of this definition by the jury. It must ever be a mere matter of speculation what influence may have been exerted upon them by the high personal and political significance of the deceased, as the chief magistrate of the government or other peculiar surroundings of a partisan nature. The case in its facts is so peculiar as scarcely to serve the purpose of a useful precedent in the future." *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

§ 412. **Views of Mr. Robert Desty.**—"The true test of responsibility lies in the word 'power'—has the defendant the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong, and the power to govern the mind, body, and estate? And it is sufficient if power to do so is shown to have existed in reference to the particular act. If he was under such defect of reason from disease of mind as not to know the quality of the act he was doing, or was under such delusion as not to understand the nature of his act, or had not sufficient memory or reason to know he was doing wrong, then he was not responsible; but if he knew what he was doing, and that the act was forbidden by law, and took precautions to accomplish his purpose, and had power of mind enough to know what he was doing at the time, then he is responsible; for it is conscious knowledge coupled with the act which constitutes crime." See Desty, Am. Crim. L. p. 62, § 23*b*, and cases cited; *Guiteau's Case*, 10 Fed. Rep. 161.

§ 413. **Views of the Florida Supreme Court.**—The relations sustained by the supreme court of Florida to this interesting topic, are best evidenced by the decision in the case of *Hodge v. State*, 26 Fla. 11, which was decided in June, 1890, with the concurrence of the full bench. Upon a careful analysis, it appears that where the defense of insanity is relied upon as an extenuation or excuse for crime, and evidence is introduced which tends to overthrow the presumption of sanity, if upon the whole evi-

dence the jury entertained a reasonable doubt of his sanity, they must acquit, regardless of whether it be adduced by the prosecution or defendant, and that the accused is not required to establish his insanity beyond a reasonable doubt; and in this we think they are correct, and that the charge of the trial judge, that the accused was required to prove his insanity beyond a reasonable doubt, was erroneous. The more humane and advanced rule on this subject is that if the jury, upon a consideration of the entire evidence, have a reasonable doubt as to the insanity of a party charged with crime at the time of committing it, it is their duty to give him the benefit of such doubt, and acquit. But the jury are to act upon a reasonable doubt of sanity in such cases, and are not to acquit upon a fanciful ground. *Armstrong v. State*, 27 Fla. 366.

§ 414. **Moral Insanity as an Excuse for Crime.**—There are other species of insanity than those referable alone to diseases of the mind, or disorders of the mental powers; that there is a species of insanity denominated by medico-legal writers as moral insanity, and sometimes a lesion of the will; and that such species of insanity may co-exist with ample mental power and perception to distinguish right from wrong, and to understand fully the nature and consequences of criminal acts; and yet the party may be impelled to the doing of an act, wrong in itself, by a morbid, irresistible impulse. This species of insanity, it is true, is recognized by many able writers upon medical jurisprudence; and by some few courts it has had a partial or qualified recognition. But, by the great majority of courts and jurists, it is, as an independent state or condition, declared to have no place in the law. All crime is committed from bad motives or impulses, and it is the great object of the law to compel people to resist and restrain their vicious criminal impulses; the law giving no impunity to their indulgence. Taylor, an author of high repute, in vol. 2 of his work on Medical Jurisprudence (edition of 1873), at page 479, says, "The intellectual disturbance may be sometimes difficult of detection; but in every case of true insanity it is more or less present, and it would be a highly dangerous practice to pronounce a person insane, when some evidence of its existence was not forthcoming. The law does not recognize moral insanity as an independent state; hence, however perverted the affections, moral feelings, or sentiments may be, a medical jurist must always look

for some indications of disturbed reason. Medically speaking, there are, according to Dr. Prichard, two forms of insanity, moral and intellectual; but in law there is only one—that which affects the mind. Moral insanity is not admitted as a bar to responsibility for civil or criminal acts, except in so far as it may be accompanied by intellectual disturbance.” And in speaking of moral or emotional insanity, as a defense for the commission of crime, the late *Mr. Justice* Curtis, in *United States v. McGlue*, 1 Curt. C. C. 1, well said: “It is an important as well as a deeply interesting study, and it finds its place in that science which ministers to diseases of the mind. . . . But the law is not a medical nor a metaphysical science. Its search is after those practical rules which may be administered without inhumanity for the security of civil society by protecting it from crime, and therefore it inquires not into the peculiar constitution of mind of the accused, or what weakness or even disorders he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had such intent the law punishes him, but if not, it holds him dispensable.”

Moral insanity as an excuse for crime is no longer recognized as a defense. *Guiteau's Case*, 10 Fed. Rep. 161; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *People v. Kerrigan*, 73 Cal. 222; *State v. Potts*, 100 N. C. 457.

But on a subject so intangible and of which so little can be clearly known we would not, in the spirit of dogmatism, undertake to say that there was no moral as distinguished from intellectual insanity.

§ 415. **Summary of the Conclusions Reached.**—Without pushing the subject into unprofitable refinements we may summarize the conclusions of legal authority by saying that the sole test of criminal responsibility is not the knowledge of right and wrong only; there must be will power to apply the knowledge and act accordingly. *Reg. v. McNaghten*, 10 Clark & F. 200; *Reg. v. Oxford*, 9 Car. & P. 532; *Reg. v. Law*, 2 Fost. & F. 836; *Reg. v. Offord*, 5 Car. & P. 168; *Reg. v. Bellingham*, cited in 1 Russell, Crimes (8th Am. ed.) *11; *Reg. v. Pearce*, 9 Car. & P. 637; *People v. Kleim*, 1 Edm. Sel. Cas. 14; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; 1 Bennett & Heard Lead. Crim. Cas. (2d ed.) 87; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Cole's Case*, 7 Abb. Pr. N. S. 321; *People v. McFarland*, 8 Abb. Pr.

N. S. 57; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Willis v. People*, 32 N. Y. 715; *Com. v. Mosler*, 4 Pa. 267; *Reg. v. Bleasdale*, 2 Car. & K. 765; *State v. Windsor*, 5 Harr. (Del.) 512; *Scott v. Com.* 4 Met. (Ky.) 227, 83 Am. Dec. 461; *Smith v. Com.* 1 Duv. 224; *Hopps v. State*, 31 Ill. 385, 83 Am. Dec. 231; *Com. v. Freeth* (Pa.) 6 Am. L. Reg. 400; *Com. v. Shurlock*, 14 Phila. Legal Int. 33; *Com. v. Smith*, 15 Phila. Legal Int. 33; *Fouts v. State*, 4 G. Greene, 500; *Bilman's Case*, cited in 1 Whart. Am. Crim. L. § 30; *People v. Pine*, 2 Barb. 566; *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634; *Graham v. Com.* 16 B. Mon. 591; *Flanagan v. People*, 52 N. Y. 467, 17 Am. Rep. 731; 1 Hale, P. C. 30; 4 Bl. Com. 21; 3 Coke, Inst. 47; Ray, Insanity; Wharton & S. Medical Jurisprudence; Dean, Medical Jurisprudence; Taylor, Medical Jurisprudence; Browne, Insanity.

In New York it seems that the sole test of insanity when interposed as a criminal defense in a criminal prosecution, is whether the defendant has knowledge of the nature and quality of the act in question, and whether it is right or wrong. *Reg. v. McNaghten's Case*, *supra*; *United States v. McGlue*, 1 Curt. C. C. 1; *Loeffner v. State*, 10 Ohio St. 598; *State v. Klinger*, 43 Mo. 127; *Brinkley v. State*, 58 Ga. 298; *Freeman v. People*, and *People v. Pine*, *supra*; *People v. Montgomery*, 13 Abb. Pr. N. S. 214; *Willis v. People*, and *Flanagan v. People*, *supra*; *Wagner v. People*, 4 Abb. App. Dec. 511.

"It is now settled, that where the fact of lunacy is proved generally, a lucid interval shall not be presumed in support of a particular transaction, although in its character perfectly rational. To sustain the validity of any such transaction, the sanity and competence of the party at the time must clearly and positively appear; the evidence must go to prove not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to insure the exercise of a sound discretion. It is enough to show, as Lord Nottingham observed, that the act is *actus sapienti conveniens*, for that may happen many ways; it must be proved to be *actus sapientis*, and to have proceeded from judgment and deliberation." Mathews, Presumptive Evidence, 19.

§ 416. **Review of the Subject by the Nevada Supreme Court.**—The supreme court of Nevada in a very recent case (*State v. Lewis*, 20 Nev. 333) gives an extended review of this

entire topic, saying *inter alia*, "if any evidence is introduced tending to prove that defendant is insane the state is bound to prove and establish his sanity like all other elements of a crime, beyond a reasonable doubt." Continuing the court says:

"It is earnestly and ably contended by learned judges, whose opinions have ever been entitled to great respect and consideration, that the burden of establishing the killing and the malicious intent is always upon the prosecution; that there cannot, logically, be any separation of the ingredients of the crime so as to require a part thereof, only, to be established by the state, and the balance to be established by the defendant; that the idea that the burden of proof ever shifts in a criminal case is unphilosophical and at war with fundamental principles of criminal law; that the rule established by a majority of the decided cases strips the defendant of the presumption of innocence which the law has given him as a shield throughout the entire proceedings, until the verdict of the jury establishes the fact, beyond a reasonable doubt, that he not only committed the act, but that he did so with malicious intent.

"We are of opinion that the weight of reason, as well as the preponderance of the authorities, is opposed to these views. It is undoubtedly true that it is incumbent upon the prosecution to prove every fact that is material, essential, and necessary to constitute the crime of which the defendant is accused, which, of course, includes the sanity of the defendant; but is it not equally true that the burden of proving his sanity is fully met by the presumption of law 'that every person is of sound mind until the contrary appears.' If this be true, then it is not a harsh, unphilosophical or inhuman rule that requires a defendant, who seeks to avoid the punishment which the law imposes upon him for the crime he has committed, by means of the defense of insanity, to rebut the presumption of sanity by proof that is satisfactory to the jury. Insanity being in its nature an affirmative defense, does it not necessarily follow that, where the insanity of the defendant is established by the presumption of law, or by the testimony of witnesses, or by both, the defendant, in order to overcome this presumption or testimony, must establish his insanity by a preponderance of the evidence?

"The presumption of the law in favor of innocence is essential, not only to the safety of the individual accused of crime, but is absolutely necessary for the protection and security of society,

and it is universally recognized in the trial of all criminal cases. But there are other legal and well recognized presumptions, sanctioned by law and approved by the wisdom of ages, which are equally as important and as indispensable to individuals, and to the well-being, safety and protection of society, and equally as necessary for the proper administration of justice in the trial of criminal cases. Within this category prominently stands the presumption of sanity. 'Every man is presumed to be sane.' Is not this presumption as necessary and as universal in its application as the presumption of innocence? Ought not proof be required to rebut the other? *State v. Lewis*, 20 Nev. 333.

"Upon the question of sanity at the time of committing an offense, the acts, conduct and habits of the prisoner at a subsequent time may be competent as evidence in his favor. But they are not admissible as of course. When admissible at all it is upon the ground either that they are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offense as to strengthen then the inference of continuance, and carry it by the time to which the injury relates, and thus establish its existence at that time; or else they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development." *Com. v. Pomeroy*, 117 Mass. 148; *State v. Lewis, supra*.

The inference to be drawn from the discussion of the cases would seem to be in favor of the more reasonable doctrine last considered. It has been a question frequently and gravely argued both by theoretical writers and in forensic discussion, and the agitation is by no means allayed nor can the principles that infest it be regarded as even settled.

CHAPTER XLIX.

EVIDENCE OF ALIBI.

- § 417. *Term Defined.*
- 418. *Essentials of Alibi Evidence.*
- 419. *What the Proof Involves.*
- 420. *Credibility of—how Strengthened.*
- 421. *Want of Harmony in the Decisions.*
- 422. *Burden of Proving with the Defendant.*
- 423. *Prejudicial Theories Regarding this Defense.*
- 424. *Shifting Nature of the Burden of Proof.*
- 425. *Not Bound to Prove beyond Reasonable Doubt.*
- 426. *Views of Mr. Justice Best.*
- 427. *The General Rule.*
- 428. *Miscellaneous Decisions.*

§ 417. **Term Defined.**—*Alibi* is a Latin word, signifying elsewhere, and, in law, means a defense interposed by the defendant, by which he proves that, at the time of the commission of the offense, he was at some other place than that where it was committed.

§ 418. **Essentials of Alibi Evidence.**—It is obviously essential to the satisfactory proof of an alibi that it should cover the whole of the time of the transaction in question, so as to render it impossible that the prisoner could have committed the act; it is not enough that it renders his guilt improbable merely. *Rex v. Fraser, Alison, Princ. 625, cited in Wills, Circ. Ev. 168.*

An alibi is a legitimate and proper defense to make, and if satisfactorily made is conclusive. Innocent men would and should resort to it, and no doubt it has often been the means of escape under wrongful charges. But it is a defense sometimes attempted by contrivance, subornation and perjury. It does not involve a complicated inquiry. Proof of it is measurably simple and direct, therefore persons may fabricate it with greater hope of success and less fear of punishment than many other kinds of evidence.

§ 419. **What the Proof Involves.**—Proof of it involves accuracy as to dates, times of day and identity of persons seen, sub-

jects in respect to which honest witnesses oftener mistake than in respect to many other things to which they testify. The direct proof therefore offered to sustain an alibi is to be subjected to a rigid scrutiny, because standing by itself it does not attempt to control or rebut the evidence of facts sustaining the charge, but attempts to prove affirmatively another fact inconsistent with it. It is in direct conflict with all the evidence tending to show the guilt of the defendant, because in so far as that tends to show he committed the offense, it tends in the same degree to show that he was at the place of the crime when committed. If therefore the proof of the alibi does not outweigh the proof that he was at the place when the crime was committed, it is not sufficient. In this conflict of evidence, whatever tends to support one theory, tends in the same degree to rebut and overthrow the other, and it is for the jury to decide which is the truth. *State v. Ward*, 61 Vt. 153.

It cannot be held as a principle of law, that the defense of alibi is liable to great abuse, growing out of the ease with which it may be fabricated, and the difficulty of detecting the fabrication. This is not always true of such a defense. Sometimes the evidence which tends to prove an alibi is open, clear, and direct, without any of the signs of fabrication about it. Sometimes, doubtless, it is open to suspicion.

So may evidence be which tends to prove any other fact. Law is fixed and uniform; it cannot be one thing in one case, and another thing in another case, as evidence may be.

We know of no rule of law which attaches a suspicion to, or fixes a blemish upon, evidence tending to prove an alibi, any more than it does upon evidence tending to prove any other fact. *Albin v. State*, 63 Ind. 598.

§ 420. **Credibility of—how Strengthened.**—"The credibility of an alibi is greatly strengthened if it be set up at the moment when the accusation is first made, and consistently maintained throughout the subsequent proceedings. On the other hand, it is a material circumstance to lessen the weight of a defense of this kind, if it be not resorted to until sometime after the charge has been made; or if having been once resorted to, a different and inconsistent defense is afterwards set up. *Wills*, Circ. Ev. 168.

"This defense often involves considerations of the most difficult and perplexing nature. It is not an uncommon artifice to endea-

vor to give coherence and effect to a fabricated defense of alibi, by assigning the events of another day to that on which the offense was committed, so that the events being true in themselves, are necessarily consistent with each other, and false only as they are applied to the day in question. Wills, Circ. Ev. 83." 2 Colby, Crim. L. chap. 4, § 7.

§ 421. **Want of Harmony in the Decisions.**—There is not entire harmony in the decisions as to the degree of proof of an alibi which must be produced, in order to entitle a defendant to an acquittal. In *French v. State*, 12 Ind. 670, 74 Am. Dec. 229, the trial court instructed the jury that, if he (the defendant) seeks to prove an alibi, he must do it by evidence which outweighs that given for the state, tending to fix his presence at the time and place of the crime. This instruction was held to be erroneous. In *State v. Waterman*, 1 Nev. 543, the following instruction was held to be erroneous: "It is not sufficient to warrant an acquittal that he merely raised a reasonable doubt as to whether the alibi is established, but, as before stated, you must be satisfied of its truth by testimony. If you believe from the testimony that the defendant, Waterman, at the time alleged, was in the city of Virginia, you must acquit him." In the course of a very lucid and able opinion, the court say: "The rule of law and of common sense is, that where there is a reasonable doubt as to whether a prisoner has committed the act or offense with which he stands charged, he must be acquitted, whether the doubt arises from a defect in the evidence introduced by the state or from the evidence in rebuttal by the defendant." In the trial of Webster for the murder of Parkman, before the supreme judicial court of Massachusetts, the following direction was given to the jury: "In the ordinary case of an alibi when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the alibi does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient." *Com. v. Webster*, 5 Cush. 324, 52 Am. Dec. 711. This doctrine was simply recognized and approved in *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; though the alibi sought to be established in that case was of the alleged deceased, and not of the prisoner.

The evidence sustaining it must outweigh the proof tending to establish its contradictory hypothesis. For this purpose a bare preponderance is sufficient. A preponderance of testimony is capable of producing very different degrees of conviction. It may be barely sufficient to turn the scale of probability in favor of the proposition which the mind is called upon to adopt. Where it so turns the scale, the fact which it favors is said to be proved by a preponderance of evidence. From this point the evidence may gradually increase in intensity until it creates full satisfaction, which is not distinguishable from satisfaction beyond a reasonable doubt. *State v. Hardin*, 46 Iowa, 623, 26 Am. Rep. 174.

There is sharp conflict in decisions in regard to the extent to which the evidence must go in order to render the alibi effectual.

§ 422. **Burden of Proving with the Defendant.**—When the defense is that of an alibi, the law casts the burden upon the defendant to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense. *Pellum v. State*, 89 Ala. 32. This rule of law, as applicable to the defense of an alibi, does not require of the defendant to reasonably satisfy the jury of his exact whereabouts every moment of the time necessary to cover the period when the offense was committed, but he is required to prove such a state of facts or circumstances as to reasonably satisfy the jury that he was elsewhere than at the place where and at the moment when the offense was committed. *Pellum v. State*, *supra*; *Allbritton v. State* (Ala.) Jan. 7, 1892; *Fate v. State*, 1 Am. & Eng. Enc. Law, 454, 455; 1 Bishop, Crim. Proc. §§ 1066, 1067.

The extent to which the proof must go in making out an independent defense has been the subject of much discussion, some authorities holding that it is sufficient in any case to create a reasonable doubt of guilt, while others favor the doctrine that the defense must be made out to the satisfaction of the jury. The rule laid down in Wharton's Criminal Evidence (§ 331) is that when the case of the prosecution is admitted and the defense is one exclusively of avoidance, then this defense must be made out by the defendant by a preponderance of proof; to which he cites many authorities. He applies this rule to all facts set up by the defendant which do not traverse any averment of the indictment. *Kent v. People*, 8 Colo. 563.

§ 423. Prejudicial Theories Regarding this Defense.—

We have met with some dicta to the effect that if this defense of alibi turns out to be untrue it amounts to a conviction. Wills, Circ. Ev. 92, citing *Justice Daly in Rex v. Killan*, 20 How. St. Tr. 1085. "But," says Mr. Wills, "it must not be overlooked that such is the weakness of human nature, there have been cases where innocence, under the alarm of menacing appearances, has fatally committed itself by the simulation of facts for the purpose of evading the force of circumstances of apparent suspicion. When the defense of an alibi fails, it is generally on the ground that the witnesses are disbelieved and the story considered to be a fabrication, and from the facility with which it may be fabricated it is commonly entertained with suspicion and sometimes, perhaps, unjustly so."

As before stated the evidence of an alibi is either true or false. If true it should acquit the defendant. If false, the introduction of it, and the attempt to procure an acquittal by it, constitutes a circumstance against him. The introduction of false or fabricated evidence in a defense is always regarded as an inferential admission of guilt, although not of a conclusive character. But to be entitled to any force, as it is only circumstantial and collateral to the main issue, it should be established beyond all question, that the party has been guilty of producing false and fabricated evidence. If this is doubtful no weight should be given to it. *State v. Ward*, 61 Vt. 153.

"It must be admitted," says Sir Michael Foster in his Crown Law, 368, "that mere alibi evidence lieth under a great and general prejudice and ought to be heard with uncommon caution; but if it be founded in truth it is the best negative evidence that can be offered; it is really positive evidence which in the nature of things necessarily implieth a negative and in many cases it is the only evidence that an innocent man can offer."

In *Briceland v. Com.* 74 Pa. 469, the supreme court of Pennsylvania carefully considered this question and says: "When a defense rests on proof of an alibi, it must cover the time when the offense is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder. Although the prisoner makes no admission of guilt by setting up an alibi, yet clearly the value of the defense consists in showing that he was absent from the place where the deed was

done, at the very time the evidence of the commonwealth tends to fix its commission upon him; for, if it be possible that he could have been at both places, the proof of the alibi is valueless."

§ 424. **Shifting Nature of the Burden of Proof.**—"In an indictment for crime, the defendant, ordinarily, is entitled to have the whole case left to the jury, upon the evidence of both sides, and if upon a consideration of all such evidence, every reasonable doubt be not removed, the jury should acquit. Therefore in a case of larceny, an instruction to the jury that the burden of proof to show the guilt of the prisoner is upon the state, but when the state has made out a *prima facie* case, and the prisoner attempts to set up an alibi, the burden of proof is shifted; and if the defense fail to establish the alibi to the satisfaction of the jury, they must find the prisoner guilty, is erroneous."

§ 425. **Not Bound to Prove beyond Reasonable Doubt.**—In Tennessee, the law has been laid down in substantially the same terms; that where the charge was "that the proof necessary to establish the alibi must be as certain as that by which the state would have to establish the guilt of the accused," this was held to be erroneous, because its effect was to exclude the prisoner from the benefit of any reasonable doubt as to his guilt, arising from the proof touching the alibi, in connection with other proof in the cause; and further that the prisoner was not bound to prove an alibi beyond a reasonable doubt. *Chappel v. State*, 7 Coldw. 92.

"Evidence of an alibi," says the supreme court of Illinois (*Miller v. People*, 39 Ill. 457) "whether sufficient to render the guilt of the defendant impossible or only improbable, is proper for the jury, and he is entitled to any reasonable doubt that may entertain upon this point; and if he attempts to prove an alibi, and fails to do so, it should have no greater weight to convince them of his guilt, than a failure to prove any other important item of defense, and should not, generally speaking, operate to his prejudice." In similar vein is a decision of the South Carolina court.

We can see no injustice in requiring matters of defense to be established according to the ordinary rule of evidence—that of a "preponderance," which is the lowest degree capable of producing conviction. If a party charged with crime pleads a particular defense, such as insanity or an alibi (or self-defense) the fact must be proved as it is alleged by him. Preponderance of evidence is

the lowest degree capable of producing conviction. Less cannot be required of one whose duty it is to establish a particular fact, subject, of course, to the general rule, that a party charged with crime is entitled to the benefit of all reasonable doubts. *State v. Paulk*, 18 S. C. 515; *State v. Bundy*, 24 S. C. 439. *State v. Nance*, 25 S. C. 173.

The defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged. *McLain v. State*, 18 Neb. 154.

§ 426. **Views of Mr. Justice Best.**—The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnesses were examined out of the hearing of each other; on being asked under what sort of tree the criminal act was done, the first said “a mastick tree” and the other “a holm tree.” The judgment of Lord Stowell also in *Evans v. Evans*, 1 Hagg. Consist. Rep. 105, shows how a supposed transaction may be disproved, by its inconsistency with surrounding circumstances. “What had you for supper?” says a modern jurist. 2 Bentham, Judicial Ev. 9. “To the merits of the cause, the contents of the supper were in themselves altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare, the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there.” The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skillfully cross-examined out of the hearing of each other; especially as courts and juries are aware that a false alibi is a favorite defense with guilty persons, and consequently listen with suspicion even to a true one. 2 Best, Ev. § 655.

§ 427. **The General Rule.**—The rule supported by the weight of authority is, that while the burden of proof to establish an alibi is on the defendant, yet, even though the evidence may fall short of establishing the plea, it may be considered by the jury with the entire evidence in determining whether a reasonable doubt of defendant's guilt has been raised. *People v. Fong Ah Sing*, 64 Cal. 253; *Kaufman v. State*, 49 Ind. 248; *Howard v.*

State, 50 Ind. 190; *Com. v. Choate*, 105 Mass. 451; *State v. Reitz*, 83 N. C. 634; *Walters v. State*, 39 Ohio St. 215; *Watson v. Com.* 95 Pa. 418; *State v. Hardin*, 46 Iowa, 623, 26 Am. Rep. 174; *State v. Watson*, 7 S. C. 63. But see *Ware v. State*, 67 Ga. 349; *Bryan v. State*, 74 Ga. 393. Rapalje, Crim. Proc. § 286.

§ 428. **Miscellaneous Decisions.**—The defense of alibi is “not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;” and we may add that if trial courts will give an instruction to this effect the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed. *People v. Lattimore*, 86 Cal. 403.

To establish an alibi the range of evidence in respect to time and place must be such as reasonably to exclude the possibility of the presence of the accused. *Wade v. State*, 65 Ga. 756; *Com v. Seybert*, 4 Kulp, 4.

An alibi need not be proved beyond reasonable doubt; it is established by a preponderance of evidence. *Walters v. State*, 39 Ohio St. 215.

Evidence tending to establish an alibi, even though not deemed by the jury sufficient for that purpose, may be considered by them, together with the other evidence in the cause, in determining whether guilt has been shown beyond a reasonable doubt. *Watson v. Com.* 95 Pa. 418.

If the jury should regard the evidence of alibi as preponderating, their belief would be that the defendant was where he could not have committed the crime, and having reached that conclusion an acquittal should follow, of course. *State v. McCracken*, 66 Iowa, 569.

Where the evidence adduced to prove an alibi is sufficient, considered with the other evidence, to create in the minds of the jury a reasonable doubt as to defendant's guilt, he is entitled to an acquittal. *Blankenship v. State*, 55 Ark. 244.

In the case of the *People v. Larned*, 7 N. Y. 448, the presiding judge charged the jury :

“That the defense interposed by the prisoner was what was in law denominated an alibi, and if the three witnesses called by him to sustain it had testified truly, the prisoner should be acquitted; that it was however insisted by the prosecution that the defense was a fabricated one and sustained by perjury; that this issue the

jury were to determine; that it was undoubtedly true that the defense of an alibi is not unfrequently the felon's plea; that when a prisoner finds himself surrounded by facts and circumstances which threaten to overwhelm him and establish his guilt, he not unfrequently resorts to this defense and seeks to maintain it by perjured witnesses; and that it was the remark of an eminent judge in England that 'in his opinion, more perjury had been committed in defenses of this description than in all other defenses interposed in criminal trials.' "

CHAPTER L.

COMPULSORY EXAMINATION OF PERSON OR PAPER.

- § 429. *Right to Examine Generally Denied in Criminal Cases.*
- 430. *Views of Mr. Justice Balcom in the McCoy Case.*
- 431. *The Authorities Examined.*
- 432. *The Rule in Civil Actions for Damages.*
- 433. *Compulsory Production of Paper.*

§ 429. **Right to Examine Generally Denied in Criminal Cases.**—In criminal trials, whether the defendant can be compelled by order of the court, against his consent, to submit to a physical examination, there is a difference of opinion. It has been supposed that it could not be done, because this compels the accused to produce evidence against himself, and violate a fundamental principle, as was held in a English custom-house case, where a motion to compel the production of books was denied. A forcible examination of a female prisoner, under an oath of a coroner, by physicians, to ascertain if she had been pregnant and recently delivered of a child, was a violation of the Constitution. But we find on this subject that the authorities are in great conflict, especially upon questions of identity of the prisoner, when that is the issue, and it becomes necessary to identify him by marks or scars on his person. We find a case decided in Nevada, in 1879, *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, in which the defendant was indicted for murder, and the question of his identity became important. A witness stated that he knew the defendant, and that he had tattoo marks (a female head and bust) on his right fore-arm. Defendant was compelled by the court, against his protest, to exhibit his arm to the jury and show the marks to them. This was held to be proper, and that it did not violate any constitutional provision, as meaning that no person shall be compelled to testify as a witness against himself; that it was not prejudicial to defendant and was not erroneous.

Hawley, *J.*, among many other things, said: "The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify against himself. To use the common phrase, it 'closes the mouth' of the prisoner. A defendant

in a criminal case cannot be compelled to give evidence under oath or affirmation, or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but as before stated, for the reason that in the sound judgment of the men who framed the constitution, it was thought that, owing to the weakness of human nature, and the various motives that actuate mankind, a defendant accused of crime might be tempted to give evidence against himself that was not true." In fairness, an extract from the dissenting opinion of Leonard, *J.*, should be noticed. After quoting from the above opinion, he says: "In my opinion, the court has not stated the only reason why the provision in question was placed in the Constitution. Had that been the only one, there would have been a prohibition against allowing a defendant to testify for himself; because in the latter case there was and is a hundred-fold more danger of falsehood than in the former. Is there not an additional reason why this provision was adopted? Was it not, in part, at least, because of the enlightened spirit of the age, that a man accused of a crime should not be compelled to furnish evidence of any kind which might tend to his conviction? Did it not come, to some extent, from the spirit of justice and humanity which established the first of all legal presumptions—that every person should be considered innocent until proven guilty? Can the person of a criminal be examined against his objection, to furnish evidence of his identity, and tending to his conviction? *Harris, Identification*, §§ 605, 606, citing *Rex v. Worsenham*, 1 *Ld. Raym.* 705; *Reg. v. Mead*, 2 *Ld. Raym.* 927; *Roe v. Harvey*, 4 *Burr.* 2489; *People v. McCoy*, 45 *How. Pr.* 216; *State v. Ah Chuey*, 14 *Nev.* 79; *Union Pac. R. Co. v. Botsford*, 141 *U. S.* 250, 35 *L. ed.* 734; *McQuigan v. Delaware, L. & W. R. Co.* 14 *L. R. A.* 466, 129 *N. Y.* 50; *Schroeder v. Chicago, R. I. & P. R. Co.* 47 *Iowa*, 375.

§ 430. Views of Mr. Justice Balcom in the McCoy Case.—

"The forcible examination of the prisoner by the physicians for the purpose of obtaining evidence that she had been pregnant, and had been delivered of a child within two or three weeks previous to the time of such examination, was in violation of the

spirit and meaning of the constitution, which declares that 'no person shall be compelled in any criminal case to be a witness against himself.' They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and been delivered of the child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child. . . . 'Has this court the right to compel the prisoner now to submit to an examination of her private parts and breasts, by physicians, and then have them testify that from such examination they are of the opinion that she is not a virgin, and has had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner.'" Balcom, *J.*, in *People v. McCoy*, 45 How. Pr. 216.

§ 431. **The Authorities Examined.**—Whether the court has power to order a compulsory examination by experts of the person of a defendant in a criminal proceeding, is an important question which has been somewhat considered by the courts, and upon which a difference of opinion exists. The question turns on the construction to be placed on the constitutional provisions which provide that the accused shall not be compelled to give evidence against himself in any criminal case. Such a provision is found in the Constitution of the United States, and in the constitutions of the several states, with hardly an exception. In *State v. Jacobs*, 50 N. C. 259, the supreme court of North Carolina, in 1858, held that a defendant could not be compelled to exhibit himself to the inspection of a jury for the purpose of enabling them to determine his status as a free negro. And this ruling was approved by the same court in *State v. Johnson*, 67 N. C. 58, in 1872. Rogers, Expert Testimony, § 78.

In a recent case in Iowa a physician made an examination of the face and neck of the defendant while in jail, and testified that he found several scratches. At the trial the defendant did not object to the admission of the testimony, but on appeal he insisted that there was error in admitting it, and claimed that the testimony was in respect to an examination to which he was compelled to submit, and that such examination was in violation of his constitutional rights, and that being so that the admission of the testimony was error, even though not objected to. The court

replying to this: "Without considering the legal questions suggested, it is sufficient to say that we see no evidence that the defendant was compelled to submit to an examination. It is true the evidence shows that when Dr. Harman went into the jail the sheriff accompanied him, but there is no evidence that the sheriff did or said anything in respect to the examination. We think there is no error in admitting the evidence." *State v. Struble*, 71 Iowa, 11.

A prisoner on trial for crime cannot be required, against objection, to try on a shoe to determine whether tracks found at the scene of the offense were his own; nor if he objects, can he properly be required to measure the shoe after trying it on. But if he tries it on without objection, the ruling that he must measure it is not prejudicial error, as any witness could do it as well as he. *People v. Mead*, 50 Mich. 228.

A defendant on trial cannot be required to make evidence against himself by trying on shoes to fit tracks found near the scene of the offense. *Stokes v. State*, 5 Baxt. 619, 30 Am. Rep. 72.

"Take the case of Stokes. The prosecution sought to compel the defendant in the court-room to put his foot in a pan of mud, in order to identify the track thus made with a track found in mud of equal softness and similar character, made by a bare foot near the scene of the homicide. The court refused to compel the defendant 'to put his foot in it.' On appeal, the case was reversed because this circumstance might have had an influence on the jury prejudicial to the defendant.

"It is argued that the act of the prosecution tended to compel the defendant to make evidence against himself. I am of opinion that too much importance has been attached and too much prominence given to the words, 'compelled to make evidence against himself.' The defendant Stokes, if he was the guilty person, was making evidence against himself when he put his foot in the mud near the scene of the homicide, and when arrested he could have been compelled to put his foot in that track, against his will, and if his foot corresponded with the track, that fact would have been admissible upon the trial of his case. *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493." Hawley, J., in *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which

the offense was committed, for it can always be used as evidence against him. A burglar is compelled to give evidence against himself, when he is forced to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to give evidence against himself, when the dies he had manufactured and used are discovered and brought into court for inspection.

The application of the principle sought to be enforced upon the reasoning of the court in *State v. Jacobs*, 50 N. C. 259, as being within the protection of the constitution, would, if logically carried out, apply to all these and many other similar cases.

In the case of *Day v. State*, 63 Ga. 669, the court held: "Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible." A defendant cannot be compelled to criminate himself by acts or words. The court says: "By the constitution of this state no person shall be compelled to give testimony tending in any manner to criminate himself; nor can one by force compel another against his consent to put his foot in a shoe-track for the purpose of using it as evidence against him on a criminal side of the court." *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717.

"The object of every criminal trial is to ascertain the truth. The constitution prohibits the state from compelling a defendant to be a witness against himself, because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood. None of the many reasons urged against the rack or torture, or against the rule compelling a man 'to be a witness against himself,' can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury, so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things, lead to a falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of the constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth." 6 Crim. L. Mag. 807; *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

§ 432. **The Rule in Civil Actions for Damages.**—There is a want of harmony in the decisions upon this point, that is suf-

ficiently indicated by the statement, that in some jurisdictions the practice is held to be utterly unknown to the law, while still other jurisdictions view the entire topic as resting within juridical discretion. The Arkansas supreme court is in discord with both these views, and holds without qualification that physical examination is a matter of right residing in the party whom it is sought to mulct in damages. The case of *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584, illustrates this position. Sibley as receiver of a bankrupt railroad corporation was sued for damages by Smith for being forcibly ejected from a passenger train, and in consequence of which he claimed to have received serious internal injuries, for which the jury gave a verdict for \$2,000 which was reversed. The appellate court after citing and commenting on several analagous cases, employed the following language: "The rule to be deduced from these cases is, that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled as a matter of right, to have the opinion of a surgeon upon his conditional opinion based upon personal examination."

This question is practically withdrawn from legal controversy by the recent decision of the United States supreme court in the case of *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734. And see the dissenting opinion in this case in vol. 2, Rice on Civil Evidence, 1112.

It has been held in Georgia that it is within the discretion of the trial court to require the plaintiff, *suving for a physical injury* alleged to be permanent, to submit to a physical examination. See *Richmond & D. R. Co. v. Childress*, 3 L. R. A. 808, and *note*, 82 Ga. 719.

If physical condition of a party is material, he has a right, when giving his testimony as to it, to exhibit it to the jury, or to an expert called to describe the injury; but he has not a right to make unsuccessful efforts before them, as evidence in his own behalf, of his incapacity. Abbott, Trial Brief, § 257, citing *Mulhado v. Brooklyn City R. Co.* 30 N. Y. 370.

§ 433. **Compulsory Production of Paper.**—Where proceedings were *in rem* to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon, pursuant to the 12th section of said Act, held that an order of the court made under said 5th section, requiring the

claimants of the goods to produce a certain invoice in court for the inspection of the government attorney, and to be offered in evidence by him, was an unconstitutional exercise of authority; and that the inspection of the invoice by the attorney, and its admission in evidence, were erroneous and unconstitutional proceedings. It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the 4th Amendment. A compulsory production of a party's books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment. It is equivalent to a compulsory production of papers, to make the non-production of them a confession of the allegations which it is pretended they will prove. A proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of that part of the 5th Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself." *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746.

PART V.

EVIDENCE IN ITS RELATIONS TO SPECIFIC OFFENSES.

INTRODUCTION.

In the concluding chapters the endeavor is to place before the practitioner such evidentiary rules as regulate the trial of specific offenses under a criminal indictment.

All attempt is disclaimed to even tabulate the list of felonies and misdemeanors, but a studious effort is made to indicate the divergences in probative methods by which peculiar evidence may sustain an indictment for certain offenses or support a traverse of its recitals. The common incidents of "Police Court" evidence tending to sustain a charge of disorderly conduct, thieving, vagrancy, etc., are presumptively within the knowledge of the practitioner after a reading of the foregoing text.

But in order to sustain a conviction for the more serious crimes the Penal Law requires a high degree of demonstration as to the guilt of the accused before it will venture to place upon him a stigma which must be borne for life and frequently transmitted to unoffending children. Here it is that technical rules engraft themselves upon the primary requirements of the law and impart an element of doubt and complexity to evidentiary procedure that it is the province of this subdivision to dispel. The attempt is to deal intelligently with such phases of the Law of Evidence as are generally regarded as exceptional—with rules of specialized and unusual application—that are far more perplexing to both bench and bar than any questions within the range of either pleading or practice.

CHAPTER LI.

FALSE PRETENSES.

- § 434. *The Offense Defined.*
- 435. *What must be Proved.*
- 436. *Must Relate to an Existing Fact.*
- 437. *Intent to Defraud must be Shown.*
- 438. *Something of Value must be Obtained.*
- 439. *Similar Frauds may also be Shown.*
- 440. *Evidence of Ability to Repay the Amount Obtained Immaterial.*
- 441. *Pretense must be Such as to Mislead Men of Ordinary Prudence—Contradiction in the Decisions.*
- 442. *Distinction between Larceny and False Pretenses.*
- 443. *Examination of the English Rule.*
- 444. *Partial Review of the Authorities.*

§ 434. **The Offense Defined.**—False pretenses consist in persuading the owner to part with his property by the utterance of a conscious falsehood by the party making the false pretenses or by the offender's simulation of a character that does not belong to it or by representing himself to be in a condition he knows he does not really occupy. *People v. Haynes*, 14 Wend. 546, 28 Am. Dec. 530.

A false pretense is a false statement about a past or present fact, and not a mere promise, opinion, or statement of something to take place. Opinion as to quantity, quality, value, amount, etc., do not constitute the crime. *Browne*, Crim. L. 50.

§ 435. **What must be Proved.**—To constitute the offense charged, four things must concur, and four distinct averments must be shown by the evidence, viz:

1. An intent to defraud;
2. Actual fraud committed;

3. False pretenses for the purpose of perpetrating fraud; and it must further appear,

4. That the fraud was accomplished by means of the false pretenses made use of; and this must be the cause which induced the owner to part with his property. *Com. v. Drew*, 19 Pick. 184; *People v. Wasservogle*, 77 Cal. 173. *State v. Matthews*, 10 L. R. A. 308, 44 Kan. 596; *People v. Jordan*, 66 Cal. 10; *People v. Wakely*, 62 Mich. 297; 2 Bishop, *Crim. Proc.* § 163.

Tested by the above rules, which seem to be supported by reason and authority, it must appear that some one has been defrauded to insure a conviction. *State v. Clark*, 46 Kan. 65.

Under indictments for this offense it is competent for the commonwealth to introduce evidence of other false pretenses made at or about the same time with the one charged, as tending to establish the guilty intent—an ingredient in every crime that must always be proved. *People v. Wakely*, 62 Mich. 298; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292; *State v. Jamison*, 74 Iowa, 613; *Com. v. Stone*, 4 Met. 43; *People v. Henssler*, 48 Mich. 49; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Bayne*, 88 Mo. 604; *Com. v. Blood*, 141 Mass. 571; *Cowan v. State*, 22 Neb. 520; *State v. Sarony*, 95 Mo. 349; *State v. Long*, 103 Ind. 481; *Mayer v. People*, 80 N. Y. 364; *Trogdon v. Com.* 31 Gratt. 862; *Rex v. Roberts*, 1 Campb. 399; *Weyman v. People*, 4 Hun, 511; *Rex v. Ellis*, 6 Barn. & C. 145; *Bielschowsky v. People*, 3 Hun, 40; *Copperman v. People*, 56 N. Y. 591; *Rex v. Davis*, 6 Car. & P. 177; *Com. v. Tuckerman*, 10 Gray, 179; *Rex v. Wylie*, 1 Bos. & P. 94; *Hitchcock's Case*, 6 City Hall Rec. 43; *Reg. v. Dossett*, 2 Car. & K. 306; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Com. v. Choate*, 105 Mass. 459; *Com. v. Coe*, 115 Mass. 481; *Rex v. Dunn*, 1 Mood. C. C. 146; *Com. v. Stone*, 4 Met. 43; *Rex v. Oddy*, 2 Den C. C. 264; *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668; *Reg. v. Forster*, 1 Dears. C. C. 456; *Com. v. Ferrigan*, 44 Pa. 386; *Bottomley v. United States*, 1 Story, 135; *People v. Wood*, 3 Park. *Crim. Rep.* 681; *State v. Williams*, 2 Rich. L. 418; *Stout v. People*, 4 Park. *Crim. Rep.* 71; *Wood v. United States*, 41 U. S. 10 Pet. 360, 10 L. ed. 994; *Reg. v. Geering*, 18 L. J. M. C. 215; *Reg. v. Richardson*, 8 Cox, C. C. 448; *Reg. v. Francis*, 12 Cox, C. C. 612; *Reg. v. Cooper*, L. R. 1 Q. B. 19.

In *Com. v. Stone*, *supra*, Shaw, *Ch. J.*, speaking of this kind of evi-

dence, said: "This is an exception to the general rule of evidence. But it must be considered that it is to prove a fact not provable by direct evidence, that is, a guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations, and can in general be proved only by external acts and conduct. The case is strictly analogous to the rule in relation to the proof of scienter on a charge of passing counterfeit bills or coins."

An indictment charging false pretenses made to a certain person, and money paid by him on the strength thereof, is supported by proof that the false representations were made to an agent who communicated the same to the principal. *Com. v. Call*, 21 Pick. 521, 32 Am. Dec. 284; *Roberts v. People*, 9 Colo. 458; 1 Whart. Am. Crim. L. § 598; 2 Whart. Am. Crim. L. §§ 2145, 2146.

To constitute the crime of obtaining property by false pretenses under the statute, two things are essential, viz: a false representation as to an existing fact and a reliance upon that representation as true. *People v. Tompkins*, 1 Park. Crim. Rep. 224.

Every species of fraudulent pretense is included within the comprehensive terms employed by the various statutes in defining this offense. It does not matter what the nature of the transaction is, if money be obtained in the manner and by the means indicated in the statute. So long as there is a false representation designedly made, with the intent to cheat and defraud, it is enough to satisfy the requirement of the law. It is true that it must be a representation which affects and influences the mind of the prosecutor and induces him to sign the instrument, or to part with his money or property, and to surrender it by reason thereof. The question to be determined is, whether the false pretense charged and proven is of such a character that it is capable of defrauding and that the prosecutor could have been deceived by it. In some of the cases decided in New York as well as the English statute which is of a similar import and substantially the same as the first named statute, there was some hesitation as to whether it should not be interpreted, having in view the restriction which existed at common law in cases of a similar character. But this disposition has yielded to a more just construction so as to give full force and effect to the statute and to furnish protection to those who, from undue confidence in others, or inexperience, are liable to become the victims of dishonest, artful and designing dealers. This interpretation is more consistent with the

intention of the law makers and the object in contemplation which was evidently to make a party responsible criminally for any false representation of a material fact designedly made with a fraudulent purpose in view and which did have the effect to cheat and defraud another. This rule has generally been upheld in the decisions with the exception perhaps of *People v. Williams*, 4 Hill, 9, 40 Am. Dec. 258, which may be regarded as tending in a different direction, although the precise point which now arises was not in that case. The later cases of *People v. Crissie*, 4 Denio, 525; *Thomas v. People*, 34 N. Y. 351; *People v. Sully*, 5 Park. Crim. Rep. 143; *People v. Oyer & Terminer Ct.* 83 N. Y. 436, are in a contrary direction. *Watson v. People*, 87 N. Y. 561, 41 Am. Rep. 397.

The English decisions fully sustain the doctrine that it is enough that the pretense was made knowingly and the money obtained thereby with the intent to defraud and that the pretense was false to the knowledge of the person making it. *Hamilton v. Reg.* 9 Q. B. 271; *Reg. v. Wickham*, 10 Ad. & El. 34.

Judge Morton in an early Massachusetts case outlines the prevailing rules that govern the production of evidence in actions for false pretenses, I excerpt from his opinion in *Com. v. Drew*, 19 Pick. 179.

What is a false pretense, within the meaning of the statute? It may be defined to be a representation of some fact or circumstance, calculated to mislead, which is not true. To give it a criminal character there must be a scienter and a fraudulent intent. Although the language of the state is very broad, and in a loose and general sense, would extend to every misrepresentation, however absurd or irrational or however easily detected; yet we think the true principles of construction render some restriction indispensable to its proper application to the principles of criminal law and to the advantageous execution of the statute. We do not mean to say that it is limited to cases against which ordinary skill and diligence cannot guard; for one of its principal objects is to protect the weak and credulous from the wiles and stratagems of the artful and cunning; but there must be some limit, and it would seem to be unreasonable to extend it to those who, having the means in their own hands, neglect to protect themselves. It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think

it safer to leave it to be fixed in each case as it may occur. *Young v. Rex*, 3 T. R. 98; 2 East, P. C. 828.

It is not the policy of the law to punish criminally mere private wrongs. And the statute may not regard naked lies, as false pretenses. It requires some artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard. He may be weak and confiding and his very imbecility and credulity should receive all practical protection. But it would be inexpedient and unwise to regard every private fraud as a legal crime. It would be better for society to leave them to civil remedies. *Rex v. Goodhall*, Russ. & R. 461; Roscoe, Crim. Ev. (2d ed.) 419.

The pretense must relate to past events. Any representation or assurance in relation to a future transaction, may be a promise or covenant or warranty, but cannot amount to a statutory false pretense. They afford an opportunity for inquiring into their truth, and there is a remedy for their breach, but it is not by a criminal prosecution. *Stuyvesant's Case*, 4 City Hall Rec. 156; *Rex v. Codrington*, 1 Car. & P. 661; Roscoe, Crim. Ev. (2d ed.) 422. The only case, *Young v. Rex*, 3 T. R. 98, which has been supposed to conflict with this doctrine, clearly supports it.

In 3 Archibold, Criminal Practice & Pleading, 467, it is said: "In order to convict a man of obtaining money or goods by false pretenses, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with the right to the property in the thing obtained, and not merely with the possession of it." *State v. Anderson*, 47 Iowa, 142.

It is not necessary that the proof should be direct but such evidence must be given and such facts established as tend legitimately and necessarily to show the existence of such intent. *People v. Pinckney*, 51 N. Y. S. R. 310; *Lesser v. People*, 73 N. Y. 78.

The gist of the offense is that the false pretense must be of a past event, or of some fact alleged to have a present existence, and not of something to happen hereafter. Mere falsification is not sufficient to maintain an indictment for this offense. *Jones v. United States*, 5 Cranch, C. C. 653; *Ranney v. People*, 22 N. Y. 413; *Keller v. State*, 51 Ind. 111; *Lesser v. People*, 12 Hun, 668; *State v. Mills*, 17 Me. 211; *State v. Rowley*, 12 Conn. 101; *Com. v. Drew*, 19 Pick. 179.

§ 436. **Must Relate to an Existing Fact.**—The frequency

with which indictments for this offense are found and tried, will excuse an extended examination of the principles that must underlie and characterize the prosecution or the defense, or should govern the juridical view of the crime, when in the charge to the jury it becomes necessary to properly outline its characteristics—or suggest the implications the evidence necessarily involves, or the nature and scope of the facts necessary to be shown in order to sustain a conviction.

A very recent case decided by the supreme court of Pennsylvania, well states the prevailing view in that jurisdiction. And after a critical examination of various statutory regulations on the subject, the phraseology of the Pennsylvania law is found to be similar in import with that employed in several other instances. Under these circumstances, I shall consider myself warranted in citing a somewhat extended extract from the opinion of *Mr. Justice Paxson* :

“The question is whether the indictment sets forth an indictable offense. It contains two counts, in each of which the defendant is charged with cheating by false pretenses. The particular act alleged was the procuring of the prosecutor’s indorsement of the defendant’s promissory note, and the false pretense charged consisted in his representing that he would use the note so indorsed to take up and cancel another note then about maturing, and upon which the prosecutor was liable as indorser. In other words, the note was given in renewal of another note of like amount, and the indictment charges that the defendant, instead of using it for this purpose, procured it to be discounted and used a portion of the proceeds for other purposes.

“A false pretense, to be within the statute, must be the assertion of an existing fact, not a promise to perform some act in the future. The man who asserts that he is the owner of a house states a fact, and one that is calculated to give him a credit. But a mere failure to keep a promise is another and very different affair. That occurs when a man fails to pay his note. It is true *Chief Justice Gibson* doubted, in *Com. v. Burdick*, 2 Pa. 164, 44 Am. Dec. 186, whether every naked lie by which a credit has been gained is not a false pretense within the statute. This doubt has run its course, and has long since ceased to disturb the criminal law of this state. . . .

"In the case in hand there was no assertion of an existing fact, nor was there anything done by which even a credit was given. The credit had been obtained when the original note was indorsed; the present note was indorsed in lieu of and for the purpose of taking up the original; the failure to use it for such purpose was certainly a dishonest act on the part of the defendant, but we do not think it punishable under the statute defining false pretenses." *Com. v. Moore* (Pa.) 3 Crim. L. Mag. 839.

False pretense relates not merely to the general mode of dealing of him who makes it, but the nature of the transaction in which he is then engaged. If he is the proprietor of a retail store, and buys goods in the usual way, to be sold therein, he is "carrying on business and dealing in the regular course of trade;" but if he buys goods to be carried away, and sold at wholesale for half their value, he is not "dealing in the ordinary course of trade." The representation of his intention in regard to the disposition of the property may be an important element in the pretense that he is dealing in the ordinary course of trade. Indeed, it may be the characteristic and distinguishing feature of the false pretense. The act of purchase in its external features is the same whether it is in the ordinary course of dealing or a wrongful procurement of property with intent to defraud. The intention of the purchaser in reference to the disposition of the goods makes it the one or the other, and his statement of that intention, in connection with a representation that he is the proprietor of a retail store, may be in itself a statement that he is dealing in the ordinary course of trade, or that he is not, according as he says that he expects to sell the goods in his store in the usual way, or that he intends to devote them to a different kind of use. It must be a statement of a fact, and not a promise, or a mere expression of a purpose. *Com v. Walker*, 108 Mass. 309. To constitute the offense it is not necessary that the pretense should be made in the express words set out in the statute. It is enough if it is plainly and intelligibly made in any form of words. *Com. v. Drew*, 153 Mass. 588, 13 Crim. L. Mag. 736.

It must clearly appear in evidence that the accused obtained the title, together with the possession of the complainant's property, by means of false pretense, as it is well settled that mere possession, in the absence of any intent on the part of the owner to renounce the title, constitutes a different offense. *State v.*

Kube, 20 Wis. 217, 91 Am. Dec. 390; *State v. Vickery*, 19 Tex. 326; *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589; *Cline v. State*, 43 Tex. 494; *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102; *Com. v. Eichelberger*, 119 Pa. 254; *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *State v. Hall*, 76 Iowa, 85; *Ross v. People*, 5 Hill, 294; *Miller v. Com.* 78 Ky. 15, 39 Am. Rep. 194; *March v. State*, 117 Ind. 547.

At the trial of an indictment against a person charged with obtaining money by false pretenses, letters written by him tending to show that he committed the crime, are admissible in evidence against him, although they also tend to show that he committed other crimes. *Com. v. Blood*, 141 Mass. 571.

And if there is any evidence in support of an allegation in an indictment there is no variance between the allegation and the proof, although the evidence is contradictory; and, if the question of variance is submitted to the jury under proper instructions, the defendant has no ground of exception. *Com. v. Blood*, *supra*.

The mere statement of an intention to do a certain thing, although made to induce the sale and although the buyer had not the intention stated is not a false pretense within the statute. *Ranney v. People*, 22 N. Y. 413; *Rex v. Goodhall*, Russ. & R. 461; *Rex v. Douglas*, Mood. C. C. 462; *Scott v. People*, 62 Barb. 62; *Reg. v. Lee*, 9 Cox, C. C. 304; *Rex v. Dale*, 7 Car. & P. 352; *People v. Tompkins*, 1 Park. Crim. Rep. 224; *Com. v. Fisher*, 9 Phila. 594; *Johnson v. State*, 41 Tex. 65; *Reg. v. Archer*, Dears. C. C. 453, 1 Jur. N. S. 479; *Reg. v. Bates*, 3 Cox, C. C. 203, 204; *Reg. v. Johnston*, 2 Mood. C. C. 254; *State v. Magee*, 11 Ind. 155; *Glackan v. Com.* 3 Met. (Ky.) 233; *People v. Getchell*, 6 Mich. 496; *Cowen v. People*, 14 Ill. 348; *Com. v. Frey*, 50 Pa. 245; 2 Russell, Crimes (6th ed.) 300; Bishop, Crim. L. (5th ed.) 419, 479.

The indictment must show what the false pretenses were, and state them with reasonable certainty and precision. *Rex v. Mason*, 1 Leach, C. C. 487; *Reg. v. Henshaw*, Leigh & C. 444. It is not necessary that the prosecution should prove them all. *State v. Mills*, 17 Me. 211; *Rex v. Hill*, Russ. & R. 190.

By reference to Cowen's Criminal Digest at page 320, we find it stated that "a false pretense must relate to an existing fact, any representation as to what will or will not happen cannot be con-

sidered as a false pretense. So that if a man obtains goods by promising to pay cash for them, or to pay for them at a future time, or gives his note for them with assurances that it will be paid at its maturity, when at the same time he does not intend to pay, these are false promises because there is no pretense that any fact exists; there is no representation as to what is then untrue." And again he says: "As a general rule, there must be a false representation by words, written or spoken by the accused, or by some one for him, to which he gives his assent. A mere false show or appearance, however specious or successful it may be, will not support a prosecution under the statute. The false pretense must not only be a misrepresentation as to an existing fact, but it must be a willful misrepresentation; or, in other words, the party must know that he is making a false misrepresentation, and it must be so alleged in the indictment. . . . The false pretense must be one, to which the jury may believe the person defrauded might and actually did give credit." And again he says, at page 326: "An allegation by speech is necessary to constitute false pretense." And again: "No false pretense made after the delivery of goods, can support an indictment for obtaining such goods by false pretenses. Then, also, pretenses must be predicated on some matter or thing pretended then to be in existence, but which in truth was not." *People v. Conger*, 1 Wheel. Crim. Cas. 448; *Allen's Case*, 3 City Hall Rec. 118; *Ranney v. People*, 22 N. Y. 413; *Conger's Case*, 4 City Hall Rec. 65; 1 Colby, Crim. L. 561-563.

In 2 Russell on Crimes at page 288, it is said: "Barely asking another for a sum of money is not sufficient, but some pretense must be used and that pretense false, and the intent is necessary to constitute the crime."

Wharton in his work on Criminal Law (7th ed.) says: "There must be always something to show adequately that a party defrauded was induced to part with his property by relying upon the truth of the alleged statements." Section 2162. And again, at section 2113, he says: In certain cases "the conduct and acts of the party will be sufficient, without any verbal assertion. Where a man assumed the name of another to whom money was due, required to be paid by a genuine instrument, it was held indictable. And where a person at Oxford, who was not a member of the university, went for the purpose of fraud, wearing a com-

moner's cap and gown and obtained goods, it was held within the act though not a word passed. And so where the defendant, an employé in a hospital, wrote to a manager for linen, not saying in words that it was for the hospital, but knowingly making that impression on the manager's mind." But in all of these cases it was by means of false token or writing.

Bishop, in his work upon Criminal Procedure, vol. 2, § 165, says that the allegation in the indictment that the money or other thing was obtained by means of false pretense, which are the statutory words, is not sufficient. The allegation must state what the pretenses were. *People v. Moore*, 37 Hun, 84.

Mere silence or suppression of the truth, a mere withholding of knowledge upon which another may act, is not sufficient to constitute false pretenses. *People v. Baker*, 96 N. Y. 340.

In prosecutions for false pretenses the evidence must show that the pretense complained of relates to a past event, or to some fact at present existing; and not to something that may happen in the future. And a false promise to do some particular act at some future time is not sufficient. *Burrow v. State*, 12 Ark. 65; *Scarlett v. State*, 25 Fla. 717; *Keller v. State*, 51 Ind. 11; *Re Snyder*, 17 Kan. 542; *State v. De Lay*, 11 West. Rep. 443, 93 Mo. 98; *State v. Magee*, 11 Ind. 154; *Ranney v. People*, 22 N. Y. 413; *State v. Green*, 7 Wis. 676; *Com. v. Drew*, 19 Pick. 179; *Dillingham v. State*, 5 Ohio St. 280; *Johnson v. State*, 41 Tex. 65; *State v. Rowley*, 12 Conn. 101; *Lesser v. People*, 12 Hun, 668; *Reg. v. Pickup*, 10 L. C. J. 310; *Reg. v. Bertles*, 13 U. C. C. P. 607; *Reg. v. Giles*, 10 Cox, C. C. 85; *Rex v. Young*, 3 T. R. 98; *Reg. v. Lee*, Leigh & C. 309; *Reg. v. Jennison*, Leigh. & C. 157; *Reg. v. West*, 8 Cox, C. C. 12; *Rex v. Asterly*, 7 Car. & P. 191; *Rex v. Parker*, 7 Car. & P. 825; *Reg. v. Gemmell*, 26 U. C. Q. B. 314; *Reg. v. Crab*, 5 U. C. L. J. N. S. 21, 11 Cox, C. C. 85; *Desty*, Crim. L. 581.

§ 437. **Intent to Defraud must be Shown.**—To constitute the offense, there must have been an intent to defraud, in connection with a false representation calculated to mislead; it is an essential part of the offense. *Com. v. Drew*, 19 Pick. 179; *Low v. Hall*, 47 N. Y. 104; *O'Connor v. State*, 30 Ala. 9; *Fay v. Com.* 28 Gratt. 912; *Brown v. People*, 16 Hun, 535; *Com. v. Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *Anable v. Com.* 24 Gratt. 570; *Trogdon v. Com.* 31 Gratt. 872. See 2 Bishop, Crim. L. (6th ed.)

§ 471; Whart. Am. Crim. L. (8th ed.) § 1184; Desty, Am. Crim. L. 588.

The essence of the crime of obtaining property under false pretenses is the intent to deceive and defraud; and it is therefore competent to show that defendant acted only under a misapprehension of the facts, and not with a deliberate fraudulent intent. *State v. Garriis*, 98 N. C. 733.

It is a well settled and rational rule that the false pretenses, in order to sustain an indictment, must be such that, if true, they would naturally and according to the usual operation of motives upon the minds of persons of ordinary prudence, produce the alleged results or in other words, that the act done by the person defrauded must be such as the apparent exigency of the case would directly induce an honest and ordinarily prudent person to do, if the pretenses were true. *People v. Stetson*, 4 Barb. 151. Hence, in order to convict a man of obtaining money or goods, etc., by false pretenses, it must be proved that they were obtained under such circumstances that the prosecutor meant to part with his right of property in the thing obtained, and not merely with the possession of it; if the prosecutor part with the possession only, and not the right of property, we have seen that the offense is larceny, and not an obtaining of the property by false pretenses. 2 Archb. Crim. Pr. & Pl. 467.

The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality. *Com. v. Tenney*, 97 Mass. 50; *Com. v. Mason*, 105 Mass. 163. The offense is complete when the property or money has been obtained by such means; and would not be purged by subsequent restoration or repayment. Evidence of ability to make the repayment is therefore immaterial and inadmissible. *Com. v. Coe*, 115 Mass. 481.

In order to constitute the crime of obtaining property by false pretenses, it is not sufficient to prove the false pretenses, and that property was obtained thereby; but the evidence must show that the false pretenses were made with intent to cheat and defraud another. Another essential element of the crime, which the people in all cases of this kind are bound to establish, is that the

money was paid, or the property parted with in reliance upon and under the inducement of the false pretenses alleged. *People v. Baker*, 96 N. Y. 340; *Scott v. People*, 62 Barb. 71; *Reg. v. Gardner*, 1 Dears. & B. C. C. 43; *Therasson v. People*, 82 N. Y. 240; *Dilleber v. Home Ins. Co.* 69 N. Y. 256; *Ranney v. People*, 22 N. Y. 417; *People v. Tompkins*, 1 Park. Crim. Rep. 239; *People v. Conger*, 1 Wheel. Crim. Cas. 448; *People v. Blanchard*, 90 N. Y. 314.

A representation, though false, is not within the statute against obtaining property, etc., by false pretenses, unless calculated to mislead persons of ordinary prudence and caution. *People v. Williams*, 4 Hill, 9, 40 Am. Dec. 258.

Upon the trial of an indictment for obtaining goods by means of false representations, it is not necessary that the prosecution should prove all the false representations alleged in the indictment. Where representations set forth in the indictment are proved, the sense in which they were used, and what was designed to be, and was understood from them, are questions for the jury. An indictment for false pretenses may be founded upon an assertion of an existing intention, although it did not in fact exist; there must be a false representation as to an existing fact. *People v. Blanchard*, 90 N. Y. 314.

In order to justify a conviction upon the trial of an indictment for false pretenses, it must appear that the prosecutor parted with his property, or signed the written instrument, as the case may be, by reason of some of the pretenses laid in the indictment, or if not solely by reason of such pretenses, that they materially influenced his action. *Therasson v. People*, 82 N. Y. 238.

So, where the property is obtained by false pretenses as to several things, and the prosecutor establishes as a fact that he was induced to part with his property by means of any one of the false inducements made, the conviction is supported. *Com. v. Morrill*, 8 Cush. 571; *People v. Wakely*, 62 Mich. 297; *State v. Dunlap*, 24 Me. 77; *State v. Vorback*, 66 Mo. 168; *Cowen v. People*, 14 Ill. 348; *State v. Mills*, 17 Me. 211; *People v. Blanchard*, *supra*; *Beasley v. State*, 59 Ala. 20.

There are numerous cases in the books of indictments under the statutes against fraud by false pretenses, and they are not all agreed in principle or result. Some of them seem to require more, and others less, of art or contrivance in the means of ac-

completing the fraud; but, according to all of them, there must be, at least, a direct and positive false assertion as to some existing matter by which the victim is induced to part with his money or property. *Ranney v. People*, 22 N. Y. 413.

§ 438. **Something of Value must be Obtained.**—To constitute the offense, something of value must be obtained by means of a false pretense with the intent to defraud. To obtain goods with the intent to defraud is not enough. It must be accomplished by a false pretense. "By the terms of the statute the pretense must be false. And the doctrine undoubtedly is, that if it is not false, though believed to be so by the person employing it, it is insufficient." 2 Bishop, Crim. L. § 417; *State v. Asher*, 50 Ark. 427.

§ 439. **Similar Frauds may be also Shown.**—Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time, provided that the transactions are so connected as to time, and so similar in other relations, that the same motive may reasonably be imputed to them all. *Judge Daniels in Weyman v. People*, 4 Hun, 511. The question whether representations mislead is one of fact rather than law. *People v. Long*, 44 Mich. 299; *Thomas v. People*, 34 N. Y. 351. As to right to show other similar representations of respondent, see *People v. Hennsler*, 48 Mich. 49; *Hall v. Naylor*, 18 N. Y. 588, 75 Am. Dec. 269; *Miller v. Barber*, 66 N. Y. 558; *Mayer v. People*, 80 N. Y. 364; *Cary v. Hotailing*, 1 Hill, 311, 37 Am. Dec. 323.

In *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596, the defendants were indicted for obtaining goods of certain persons by false pretenses. Evidence of the purchase of other goods from other persons was held competent on the question of criminal intent. *Reg. v. Rosebuck*, Dears. & B. C. C. 24, was another case of false pretenses. The false pretense was that a chain, pledged by the defendant to a pawnbroker, was silver. Evidence that the defendant a few days afterwards offered a similar chain to another pawnbroker was held admissible. *Reg. v. Francis*, 12 Cox, C. C. 612; *Hitchcock's Case*, 6 City Hall Rec. 43; *Rex v. Parsons*, 1 W. Bl. 392; *Rex v. Roberts*, 1 Campb. 399. Such evidence can-

not fail to mislead a jury, and it will be assumed that it did so. *Coleman v. People*, 55 N. Y. 81.

Where upon the trial of an indictment for obtaining goods on credit, by means of false representations on the part of the prisoner as to his responsibility, the representations charging their falsity, and the knowledge of the accused that they were false is established, the allegation that they were made with intent to defraud may be supported by proof of dealings of the prisoner with parties other than the complainant, such as purchases made upon the faith of similar representations, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character, to authorize an inference that the purchase from the complainant was made in pursuance of the same general purpose. So, also, similar representations made by the prisoner to creditors, from whom goods had been previously purchased by him, although no goods were obtained by means of the representations, may be proved when evidence has been given tending to show that he was at the time making fraudulent disposition of the goods purchased. Such evidence is relevant, not as bearing upon the question whether the prisoner made the representations charged, but as tending to show a motive in pursuance of the general fraudulent scheme, to quiet the creditors and retain control of the goods, so as to continue the fraudulent disposition of them. *Mayer v. People*, 80 N. Y. 364. There are cases holding that it is only as part of the *res gestæ*, that evidence of other acts can be received in a criminal case to show the intent. 2 Best, Ev. (Wood's ed. 1876), 876, 888, *note*; *Reg. v. Oddy*, 5 Cox, C. C. 210, 215; *Copperman v. People*, 56 N. Y. 594; *People v. Corbin*, 56 N. Y. 363. In such cases only prior acts, never subsequent acts, can be inquired into.

The principle upon which such evidence is admitted is, that, "though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet, whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible." *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

In the case of *Mayer v. People*, 80 N. Y. 376, which was the case of an indictment for obtaining goods by false pretenses, Rapallo, *J.*, in speaking of the admissibility of testimony of this nature upon the question of intent, said: "that when the representations, their falsity and the knowledge of the accused that they were false is established by competent testimony, the allegation that they were made with intent to defraud may be supported by proof of dealings by the accused with parties other than the complainant, which tends to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general purpose."

The objections to the admissions of evidence as to other transactions, in which the prisoner has been guilty of false pretense are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well settled rule of the criminal law, that the general character of a defendant cannot be shown to be bad, unless he shall first himself attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description. *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

It may well be doubted whether the exceptions to the general rule of law ought to be further extended. In *Reg. v. Oddy*, 5 Cox, C. C. 210, Lord Campbell remarks, as to the reception of evidence where base coin or counterfeit bills are charged to have been knowingly uttered, "I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally." See *Reg. v. Holt*, 8 Cox, C. C. 411.

Generally speaking, on a trial for a criminal offense, evidence showing the commission of other offenses of a similar character is competent, provided these other offenses tend to show the *quo animo* of the specific offense for which the accused is being tried. *State v. Williams*, 2 Rich. L. 418; *Weyman v. People*, 4 Hun,

511; *Rex v. Roberts*, 1 Campb. 399; *Bielschowsky v. People*, 3 Hun, 40; *Rex v. Ellis*, 6 Barn. & C. 145; *Copperman v. People*, 56 N. Y. 591; *Com. v. Tuckerman*, 10 Gray, 179; *Rex v. Davis*, 6 Car. & P. 177; *Hitchcock's Case*, 6 City Hall Rec. 43; *Rex v. Wylie*, 1 Bos. & P. 94; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Rex v. Dossett*, 2 Car. & K. 306; *Com. v. Coe*, 115 Mass. 481; *Com. v. Choate*, 105 Mass. 459; *Com. v. Stone*, 4 Met. 43; *Rex v. Dunn*, 1 Mood. C. C. 146; *Com. v. Price*, 10 Gray, 472, 71 Am. Dec. 668; *Rex v. Oddy*, 2 Den. C. C. 264; *Com. v. Ferrigan*, 44 Pa. 386; *Reg. v. Forster*, Dears. C. C. 456; *People v. Wood*, 3 Park. Crim. Rep. 681; *Bottomley v. United States*, 1 Story, 135; *Stout v. People*, 4 Park. Crim. Rep. 71; *Wood v. United States*, 41 U. S. 16 Pet. 360, 10 L. ed. 994; *Reg. v. Richardson*, 8 Cox, C. C. 448; *Reg. v. Francis*, 12 Cox, C. C. 612; *Reg. v. Cooper*, L. R. 1 Q. B. 19.

§ 440. **Evidence of Ability to Repay the Amount Obtained Immaterial.**—It is no defense to an indictment alleging the obtaining of money by false pretenses, that the person so obtaining the money intended to repay it, and evidence of ability to make the repayment is immaterial. Where the property obtained by false pretenses is a check for \$7000, evidence that the check, which was given as for a loan of money, was drawn on a bank, that the drawer at the time made deposits in two banks and was in the habit of drawing on one of them, is sufficient to warrant the jury in finding that the check was of value. *Com. v. Coe*, 115 Mass. 481.

§ 441. **Pretense must be such as to Mislead Men of Ordinary Prudence—Contradiction in the Decisions.**—A criminal prosecution cannot be based upon false representations which are not of such a character that a man of common understanding is justified in relying upon them. *State v. Burnett*, 119 Ind. 392.

This ruling of the Indiana court is utterly repudiated in other jurisdictions and must be regarded as a startling digression from the entire current of recent authority. Mr. Wharton says (2 Am. Crim. L. § 1188): "The prosecutor's capacities and opportunities must be considered in determining his culpability. The question of carelessness is to be determined from the prosecutor's standpoint. To obtain from a jeweler money by exhibiting a spurious jewel might not be within the statute for the jeweler to offer the same spurious stone to an ignorant customer. Gross

carelessness is to be determined by the capacity of the prosecutor. The weaker the mind, the less stringent the rule."

Mr. Bishop says (2 Crim. L. §§ 433, 436): "But must the pretense be such as it is calculated to mislead men of ordinary prudence? Some of the other cases lay down the doctrine that it must. But in reason, and it is believed, according to the better modern authorities, a pretense calculated to mislead a weak mind, if practiced on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, if practiced on the latter. Practically, it is impossible to estimate a false pretense otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance, it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth, there is not one who would not be pronounced to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath could not be done by a man of ordinary judgment and discretion. These facts being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretense, an argument, an inducement to action, in any other scale than that of its effect."

There has been a conflict of opinion as to whether the false pretenses, to be indictable, should be such as would necessarily impose upon a man of ordinary prudence. In New York, Pennsylvania, Arkansas, and some of the other states, it has been held that a representation, though false, is not within the statute making it an offense to obtain money or other property under false pretenses, unless calculated to deceive persons of ordinary prudence. In Pennsylvania and New York such is no longer the law, it being now held that it is not less a false pretense that the party imposed upon might by common prudence have avoided the imposition. We think that it is generally received both in England and the United States as the law, that the pretense need not be such an artificial device as will impose upon a man of ordinary prudence or caution, that the pretense need not be such as cannot be guarded against by ordinary caution or common prudence. *Colbert v. State*, 1 Tex. App. 314.

If the construction should be narrowed to cases which might be guarded against by common prudence, the weak and imbecile, the usual victims of these pretenses, would be left unprotected. *State v. Mills*, 17 Me. 211.

It is none the less a false pretense because the party imposed on might, by common prudence, have avoided the imposition. *Com. v. Henry*, 22 Pa. 253.

The object and purpose of the law is, to protect all persons alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person supposed to exercise it. Thus, a child entrusted with a watch, money or other valuables, to be borne to an artificer, merchant or friend might be induced by the most flimsy and self-apparent falsehoods, to part with it; still, if these representations were of a character to secure the credit of the child and deprive it of the possession of the goods, however absurd such representations might seem to the more mature and experienced, yet it would be such false pretenses by one person to another as deprived that other of his personal property, as contemplated by the letter and spirit of the law. *Bowen v. State*, 9 Baxt. 45, 40 Am. Rep. 71.

§ 442. **Distinction between Larceny and False Pretenses.**—The distinction between the two crimes is sometimes very narrow, but yet it is well defined. Where, by means of fraud, conspiracy or artifice, possession of the property is obtained with felonious intent and the title still remains in the owner, larceny is established; while the crime is false pretenses if the title as well as the possession is absolutely parted with.

In *Com. v. Barry*, 124 Mass. 325, there was evidence that as A was passing a bar-room, the defendant, a girl, called him in, and he, at her request, gave her money to buy a bottle of brandy; they went upstairs together, and she said this bottle would not be enough for the night, and asked for more money with which to buy another bottle. A thereupon gave her a twenty-dollar bill to get a quart of brandy, the price of which was \$3, not expecting to receive the bill back, but the change after deducting the price of the brandy; the defendant went out, and soon returned with another girl, saying she could not get it; the other girl said she knew where to get it, and the two girls went out, and he saw

no more of them or his money. Upon this evidence the supreme court of Massachusetts had no difficulty in holding the defendant properly convicted of larceny.

In the case of *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123, it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and under the pretense that he had a check for \$500 he desired to get cashed at a bank, invited Olason to go with him; he led him into a saloon, where was the prisoner Loomis, a confederate of Lewis. Lewis proposed to Loomis to throw dice; they did so for \$5, and Loomis lost; they then proposed to throw for \$100. Lewis asked Olason to lend him \$90, saying, "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go up to the bank and get the check cashed, and you can have the money." Olason let him have the \$90, the dice were thrown, and Lewis lost. Olason insisted on the return of his money; the purported check was then put up against \$100, and Lewis again lost; Loomis and Lewis thereupon went away. The court charged the jury that if satisfied, that the two prisoners conspired fraudulently to obtain the complainant's money, and to convert it absolutely without his consent, they could convict of larceny; and it was held no error, and that the evidence was sufficient to sustain the conviction, the court observing: "It was a clear case of larceny. . . . The form of throwing the dice was only a cover, a device and contrivance to conceal the original design and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting, and the offense is not larceny where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*; yet, as is well said by a writer upon criminal law: 'It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, and then converts it to his own use. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animo furandi* avails himself of a temporary possession for a specific purpose, obtained by consent, to convert the property in the thing to himself, and defraud

the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against the will of the owner, and is a trespasser because a trespass upon the property of another is only doing some act upon that property against the will of the owner.'”

§ 443. **Examination of the English Rule.**—“By 24 and 25 Vict., chap. 96, § 88, whosoever shall, by any false pretense obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three (now five) years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.

“By the same section it is provided ‘that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.’

“By the same section, ‘provided also, that it shall be sufficient in any indictment for obtaining, or attempting to obtain, any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging any intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security, and on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.’” 2 Roscoe, Crim. Ev. (8th ed.) *497.

On an indictment for obtaining goods by false pretenses, the government is not held to proof of all the pretenses alleged. See cases cited in 2 Bishop, Crim. Proc., §§ 165–171. But if there is no variance in such case, it certainly would savor of great refinement to hold that there is a variance when the indictment charges a conspiracy to obtain the goods by several false pretenses, and only one is proved. The ground taken in argument is, that in the latter case the agreement between the conspirators is not proved as laid. But the means by which the cheating is to be accomplished are not necessarily to be held to be indivisible. The

specification of them is required in our practice, in cases where the purpose itself of the alleged conspiracy is not criminal or unlawful, in order that it may appear that the means contemplated to carry it out are criminal and unlawful.

According to the practice in England, as we gather from the course of the decisions, it is not necessary to set out the contemplated means for effecting the cheat. *Rex v. Gill*, 2 Barn. & Ald. 204; *Reg. v. Gompertz*, 9 Q. B. 824; *Sydserrff v. Reg.* 11 Q. B. 245; *Latham v. Reg.* 5 Best. & S. 635. But in order to give needed information to the court and to the defendant, where there is merely a general charge of a conspiracy to obtain goods by false pretenses, a specification of particulars is ordered by the court, if moved for. *Reg. v. Kenrick*, 5 Q. B. 49; *Rex v. Hamilton*, 7 Car. & P. 448; *Reg. v. Brown*, 8 Cox, C. C. 69. In Massachusetts, as in others of the United States, it is held that this information should be given in the indictment, in cases where the purpose of the conspiracy itself does not appear to be criminal or unlawful, and that this rule applies to conspiracies to cheat, as cheating is not necessarily criminal or unlawful. *Com. v. Hunt*, 4 Met. 111; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Com. v. Shedd*, 7 Cush. 514; *Com. v. Wallace*, 16 Gray, 221.

§ 444. **Partial Review of the Authorities.**—In *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123, it is stated: "Where, by fraud, conspiracy, or artifice, the possession is obtained with a felonious design, and title still remains in the owner, larceny is established. Where title as well as possession is absolutely parted with, the crime is false pretenses." Compare Whart. Am. Crim. L. (9th ed.), §§ 964, 965, and *Kellogg v. State*, 26 Ohio St. 15.

In *People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303, false pretenses were used to obtain charity, and it was held that the obtaining money by the applicant for that purpose by such means was not a criminal offense, as they called upon the donor to perform a moral duty, arising out of compassion, and that the statute was designed only to protect persons in their commercial dealings; and in *People v. Thomas*, 3 Hill, 169, the false pretenses induced the performance of a legal duty, and for that reason constituted no criminal offense.

In Virginia, the statute makes the obtaining of money or other property by any false pretense, larceny. In that state, the court

holds that an indictment for the offense may be either in the form of an indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny. *Leftwich v. Com.* 20 Gratt. 716; *Dowdy v. Com.* 9 Gratt. 727, 734, 60 Am. Dec. 314.

If any of the pretenses are false, to which persons of ordinary caution would give credit, it is sufficient. *People v. Haynes*, 11 Wend. 557; *People v. Thomas*, 23 N. Y. 321. Any false pretense, which induces confidence, is sufficient. *Thomas v. People*, 34 N. Y. 352; *Smith v. People*, 47 N. Y. 303.

Under the common law a false bank check is not a false token. *Com. v. Speer*, 2 Va. Cas. 65; *Com. v. Swinney*, 1 Va. Cas. 146; *Rex v. Lara*, 6 T. R. 565; *Rex v. Flint*, Russ. & R. 460; *State v. Justice*, 13 N. C. 199; *State v. Stroll*, 1 Rich. L. 244; Whart. Am. Crim. L. §§ 2061, 2065; 2 Russell, Crimes, 285, 286; 3 Archb. Crim. Pr. & Pl. 473, and notes by Waterman.

Even where the evidence shows that the accused had both the intention and the ability to pay for the articles purchased, a conviction must follow. The act is not bereft of its criminality by evidence of intent or ability to pay. *Com. v. Coe*, 115 Mass. 481; *Com. v. Mason*, 105 Mass. 163. It is not of the essence of the misdemeanor that the defendant should be unable to restore that which he wrongfully obtains. If, by a false pretense, he had procured the loan of \$500 in bank notes, his ability to refund the money would not shield him, and it would not be necessary to aver his inability to repay. *State v. Fletcher*, 35 N. J. L. 445.

In the English case of *Reg. v. Bryan*, 1 Dears. & B. C. C. 265, decided in 1867, the prisoner succeeded in obtaining a substantial loan from a pawnbroker on some very inferior spoons by fraudulently and falsely representing them to be as good as "Elkington's A," spoons, to have as much silver on them, that the foundations were of the best material, etc. It was held, however, that he could not be convicted of obtaining money by false pretenses, because his statements were in the nature of "mere praise or exaggeration, or puffing."

"It seems to me," said Lord Campbell, *Ch. J.*, "it never could have been the intention of the legislators to make it an indictable offense for the seller to exaggerate the quality of that which he is selling, any more than it would be an indictable offense for the purchaser, during the bargain, to depreciate the quality of the

goods, and to say that they were not equal to that which they really were . . . As yet, I find no case in which a mere misrepresentation at the time of sale of the quality of the goods has been held to be an indictable offense." Shirley, Lead. Crim. Cas. 66.

The intent with which the alleged false pretense is perpetrated, is always a question of fact for the jury, and is an essential ingredient of the charge. The evidence must disclose the intent to the satisfaction of the jury. *Trogdon v. Com.* 31 Gratt. 872; *People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240; *Brown v. People*, 16 Hun, 535; *Parmelee v. People*, 8 Hun, 623.

In *Reg. v. Mills*, 1 Dears. & B. C. C. 205, the prisoner was charged with obtaining money by the false pretense that he had cut sixty-three fans of chaff, when in fact he had only cut forty-five. It appeared by the evidence that the prisoner was employed to cut chaff at twopence per fan, and that on making the false pretense alleged in the indictment, he demanded 10s. 6d. from the prosecutor. The prosecutor had previously seen the prisoner remove eighteen fans from an adjoining place and add them to the heap which he pretended he had cut, but, notwithstanding this knowledge, he paid the prisoner the amount he demanded. It was held that there ought not to be a conviction, because the money had not been obtained by means of the false pretense.

"The test is," says Cockburn, *Ch. J.*, "what is the motive operating on the mind of the prosecutor which induced him to part with his money? Here the prosecutor knew that the pretense was false, he had the same knowledge of its falseness as the prisoner. It was not the false pretense, therefore, which induced the prosecutor to part with his money; and if it is said that it was parted with from a desire to entrap the prisoner, how can it be said to have been obtained by means of the false pretense?"

It must always appear in evidence on an indictment for obtaining goods by false pretenses, that the prosecutor parted with the goods upon the faith of the false pretense alleged.

CHAPTER LII.

LARCENY.

§ 445. *Larceny Defined.*

446. *Larceny Includes False Pretenses and Embezzlement.*

447. *Distinction between Larceny and False Pretenses still Preserved.*

448. *Felonious Intent must be Shown.*

449. *Every Larceny must Include a Trespass.*

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451. *What may be Shown when Identity is in Question.*

452. *Recent Possession of Stolen Property may be Shown.*

453. *Evidence of other Similar Offenses.*

454. *Case of Reg. v. Thomas Considered.*

455. *Evidence of Value.*

456. *New York Rule as to Name of Party Defrauded.*

457. *Review of Miscellaneous Authorities.*

§ 445. **Larceny Defined.**—"A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either,

"1. Takes from the possession of the true owner, or of any other person, or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or,

"2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof:

"Steals such property, and is guilty of larceny." N. Y. Penal Code, § 528.

Larceny, by the common law, is defined to be "the felonious taking and carrying away of the personal goods or property of another." *Johnson v. People*, 113 Ill. 99.

§ 446. **Larceny Includes False Pretenses and Embezzlement.**—The definition of the term larceny has now been broadened so as to take within it the offenses formerly known as false pretenses and embezzlement. And as between them and the common law offense of larceny, a distinction remains which must be observed in the presentation by indictment. *People v. Dumar*, 106 N. Y. 502. And we think the change exists only in the definition, and does not go to the legal effect except so far as it is produced by the terms of the statute. And that as relating to those offenses which have been given the name of larceny by the statute, the consequences in respect to the property taken continue the same as they were before. The principle upon which the distinction in that respect rested, was that larceny at common law was the act of feloniously taking property, which was without the consent of the owner, while obtaining it by false pretenses was produced by the consent and delivery of it by the owner to the fraudulent vendee, and when so delivered with the intent at the time being to part with the title and invest it in the latter, the effect of a common law larceny was not given to it, so as to defeat the title of a bona fide purchaser for value. *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589.

The same reason for this rule exists now as before the application of the extended definition. in *Benedict v. Williams*, 48 Hun, 123.

The distinction, although fine, is quite clear, between larceny and obtaining money under false pretenses. *Thorne v. Turck*, 94 N. Y. 95, 46 Am. Rep. 126, citing *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123.

§ 447. **Distinction between Larceny and False Pretenses still Preserved.**—The distinction between larceny and false pretenses is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time many of the cases were decided larceny was a capital felony in England, and the judges naturally

leaned to a merciful interpretation of the law out of a tender regard for human life. The distinction between larceny and cheating by false pretenses is well stated in Russell, Crimes (5th Am. ed.) 28. After an exhaustive review of the cases the learned author says: "The correct distinction in cases of this kind seems to be that if, by means of any trick or artifice, the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offense of the party obtaining them will not be larceny, but the offense of obtaining goods by false pretenses." *Com. v. Eichelberger*, 119 Pa. 254.

There is still in the state of New York the crime of larceny, and the crime of obtaining property under false pretenses, with different definitions by statute, and subjecting the offender to different punishments; the one a misdemeanor, the other a felony. All distinction between them has been abolished in some of the states of the Union, but until the legislature interferes, the courts of this state have no right or power to disregard that distinction however technical it may seem. This distinction as we understand it is this: In larceny, the owner of the thing stolen has no intention to part with his property therein; in false pretenses, the owner does intend to part with his property in the thing, but this intention is the result of fraudulent contrivances. And one test we conceive to be this: Could the offender confer a good title upon another by the sale and delivery of the thing? I do not mean to apply this test to the case of money, but goods and chattels. If obtained by larceny it is clear he could not. *Bassett v. Spofford*, 45 N. Y. 388, 6 Am. Rep. 101. If obtained by fraud it is equally clear that he could, for in that case the property passes in the subject-matter. In the former case it does not.

§ 448. **Felonious Intent must be Shown.**—The felonious intent must exist at the time of taking or obtaining possession of the property, where the possession is obtained by means of false representation or pretense. Where, however, the offense consists in the secreting, withholding or appropriating, or where it consists in the appropriating of property by bailee, servant, attorney, agent, clerk, etc., it is only necessary that the felonious intent exists at the time of such secreting, withholding or appropriating

of the property, for in such cases the property stolen would be property in the possession of the party secreting, withholding or appropriating it. *People v. Moore*, 37 Hun, 84.

It has been my endeavor in a somewhat extended investigation of the rules of evidence required in crimes of this nature, to reproduce the most recent judicial comment upon the subject. A formidable array of authority has been critically examined; and my conclusion is that *Chief Justice* Leonard of the Nevada supreme court in the case of *State v. Slingerland*, 19 Nev. 135, has stated the conclusions of both reason and authority that underlie this entire topic of evidence of intent in cases of larceny. It should be borne in mind, that there is a studious attempt in certain quarters to engraft a refinement upon the law governing larceny, in order that it may appear that an essential ingredient of the offense is wanting where the taking of the property is shown to have been without a view to pecuniary profit, but rather in a spirit of malicious mischief. In reproducing *Judge* Leonard's opinion, my idea is, to dissipate the errors arising from this view; and show the inadmissibility of evidence tending to establish a mere malicious taking with a view to annoyance and vexation. His honor says, in commenting upon an instruction which was alleged to have been erroneous:

"The court instructed the jury that, if they believed beyond a reasonable doubt that the defendant took the property as alleged in the indictment, with the intent to permanently deprive the owner of the property, and without any intention to return the same, it was a felonious intent, and the defendant was guilty. It is claimed that this instruction is erroneous in stating that the crime of grand larceny may be committed, although the taker of the property alleged to have been stolen derives no benefit, and does not intend or expect to be benefited therefrom. If one of the essential elements of larceny is an intention to profit by the conversion of the property, then the instruction under consideration was incorrect. A court cannot instruct a jury that certain facts constitute a certain offense, unless every essential fact necessary to constitute the offense be included in the statement. *Weston v. United States*, 5 Cranch, C. C. 494. Although the authorities upon this question are somewhat conflicting, those sustaining the instruction greatly preponderate, and, in our opinion, they are upheld by good sense and sound reason.

"In *State v. Mills*, 12 Nev. 403, this court acknowledged the correctness of the principle that, where the intent is to deprive the owner of his property, it is not essential that the taking should be with a view to pecuniary profit.

"In *Dignowitty v. State*, 17 Tex. 530, 67 Am. Dec. 670, the court said: 'But to constitute the felonious intent, it is not necessary that the taking should be done *lucri causa*; taking with an intention to destroy will be sufficient to constitute the offense, if done to serve the offender or another person, though not in a pecuniary way.'

"And, said the court in *Hamilton v. State*, 35 Miss. 219: 'The rule is now well settled that it is not necessary, to constitute larceny, that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker, and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property.' Roscoe, *Crim. Ev.* (2d ed.) 533; *Rex v. Cabbage*, Russ. & R. 292; *Rex v. Morfit*, Russ. & R. 307. And it is said by the commissioners of criminal law in England, that 'the ulterior motive by which the taker is influenced in depriving the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial.' The rule we consider to be in accordance with the principle on which the law of larceny rests, which is to punish the thief for wrongfully and feloniously depriving the owner of his property. The reason of the law is to secure a man's property to him, and that is to be carried out rather by punishing the thief for feloniously depriving him of it, than for wrongful gain he has made by the theft. The mortal wrong is founded in the wrongful and felonious deprivation."

"Sustaining the same doctrine in *Warden v. State*, 60 Miss. 640, the court said: 'It seems to meet the approval, also, of most of the modern writers on criminal law, and to be sanctioned by many cases both English and American.'

"In *State v. South*, 28 N. J. L. 28, 75 Am. Dec. 250, the question was whether the fraudulently depriving the owner of the temporary use of a chattel is larceny at common law; whether the felonious intent or *animus furandi* may consist with an intention to return the chattel to the owner. It was held that if the property is taken with the intention of using it temporarily only, and then returning it to the owner, it is not larceny; but if it appear

that the goods were taken with the intention of permanently depriving the owner thereof, then it is larceny. And in *State v. Davis*, 38 N. J. L. 177, 20 Am. Rep. 367, the same court adhered to the doctrine announced in *State v. South, supra*, and said: 'There has been no case decided in this state that has held that where the taker had no intention to return the goods, that the taking was merely temporary. Nor is there anything that should control the action of the jury, or the court acting as such, under the statute, when they find that the party having no such intent is guilty of larceny. It would be a most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of another, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker.'

"In *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506, and *Com. v. Mason*, 105 Mass. 166, it was held that the wrongful taking of the property of another, without his consent, with intent to conceal it until the owner offered a reward for its return, and for the purpose of obtaining the reward, was larceny of the property taken. And see also, *People v. Jaurez*, 28 Cal. 380; *State v. Brown*, 3 Strobb. L. 516; *Keely v. State*, 14 Ind. 36; *Rex v. Cabbage* '1 Russ. & R. 292; 1 *Rex v. Morfit*, Russ. & R. 307; *Reg. v. Holloway*, 1 Den. C. C. 376, *note a.* . . .

"Mr. Stevens, in his General View of the Criminal Law of England, 127 says: 'It is larceny to take and carry away a personal chattel from the possession of its owner with intent to deprive him of the property.'

"Mr. Roscoe, in his Criminal Evidence, 621, says: 'Eyre, *Ch. B.*, in the definition given by him, says: 'Larceny is the wrongful taking of the goods with the intent to spoil the owner of them *lucri causa.*' And Blackstone says: 'The taking must be felonious, that is, done *animo furandi*, or, as the civil law expresses it, *lucri causa.*' The point arrived at by these two expressions, *animo furandi* and *lucri causa*, the meaning of which has been much discussed, seems to be this, that the goods must be taken into the possession of the thief with the intention of depriving the owner of his property in them. . . . Property is the right to the possession, coupled with an ability to exercise that right. Bearing this in mind, we may perhaps safely define larceny as follows: the wrongful taking possession of the goods of

another with intent to deprive the owner of his property in them.* And see, Archb. Crim. Pr. & Pl. (Pomeroy's Notes) 1185; Barbour, Crim. L. 174; 2 Bishop, Crim. L. 848.

"Against these authorities . . . we are referred to four cases, viz: *People v. Woodward*, 31 Hun, 57; *Smith v. Shultz*, 2 Ill. 490; *Wilson v. People*, 39 N. Y. 459, and *United State v. Durkee*, 1 McAll. 196. In *People v. Woodward*, there was an able and exhaustive dissenting opinion by one of the three justices, and no authorities are cited in support of the majority opinion except Whart. Am. Crim. L. § 1784, and certain cases therein referred to, which do not sustain the text. In *Smith v. Shultz*, *supra*, the court only says: 'Every taking of the property of another without his knowledge or consent does not amount to larceny. To make it such, the taking must be accompanied by circumstances which demonstrate a felonious intention.'

"But the court does not say there can be no felonious intent except there be a taking *lucri causa*. In *Reg. v. Holloway*, 1 Den. C. C. 376, Parke, B., defined 'felonious' to mean that there is no color of right or excuse for the act, and the intent must be to deprive the owner, not temporarily, but permanently, of the property. In *Wilson v. People*, *supra*, it was only decided that the felonious intent must exist at the time of the taking. In *United States v. Durkee*, *supra*, the court instructed the jury as follows: '1. That, if you believe from the evidence, that the prisoner took and carried away the arms with intent to appropriate them, or any portion of them, to his own use, or permanently deprived the owner of the same, then he is guilty. 2. But if you believe that he did not take the arms for the purpose of appropriating them, or any part thereof, to his own use, and only for the purpose of preventing their being used on himself or his associates, then the prisoner is not guilty.' . . .

"To constitute larceny the taking must be felonious, and it is so when the intent is to permanently deprive the owner of his property, against his will." *

*NOTE.—The extreme importance of this matter is quite obvious, whether the accused is to be precluded from introducing evidence tending to show that the taking was in a spirit of mere mischief, or was with a felonious intent, is evidently a question of considerable importance, at least to the party on trial. In the one case, he is punishable for misdemeanor with the possibility of a mere

§ 449. Every Larceny must Include a Trespass.—It is a well established, but somewhat technical rule, that every larceny

fine. In the other case, it is treated as a felony, and he meets with a criminal's brand that follows him through life. That the distinction I have undertaken to outline is by no means fanciful, I will refer to the recent case of *People v. Woodward*, 31 Hun, 57, decided by the general term of the supreme court of the state of New York. Boardman, *J.*, says: "Upon the evidence it is certainly a grave question whether the act charged and proved was larceny or malicious mischief. To constitute larceny there must have been a felonious intent, *animo furandi* or *lucris causa*. The malicious killing of a horse is a misdemeanor. The offenses are quite distinct. In either case there is a trespass. In larceny the taking must be for the purpose of converting to the use of the taker. In malicious mischief no such intent is necessary. In the present case the evidence tends to show a taking of the horse to kill him, with a sole desire to injure the owner. It was incumbent on the court then to point out to the jury the legal elements in the crime of larceny, so as to distinguish it from malicious mischief. This, we think, was not done. The jury was told, in substance, if defendant took or procured to be taken this horse, and killed or aided in killing him, he must be found guilty. In no part of the charge is this language modified or qualified.

"The seventh request to charge is as follows: 'There must have been a felonious intent, for without such an intent there was no crime, and the felonious intent must have been formed before the taking; and that if, before the taking of the horse, the intent was to take it and kill it, the crime would not be a felony, but an offense under the statute, classed among misdemeanors under the term of malicious mischief.' The defendant excepted to the refusal to charge as requested. The request to charge, the refusal to charge, and the exception are all very informal and inartificial, but sufficient, we think, to present the important point in the case.

"The defendant was entitled to have the jury instructed in substance as requested. Mr. Wharton in his work on Criminal Law, §§ 1781-1784, has considered whether larceny can exist where there is no intent on the part of the taker to reap any advantage from the taking. He has reviewed the decisions from the case of *Rex v. Cabbage*, 1 Russ. & R. 292, to the time of his writing, and concluded that the qualification, '*lucris causa*,' has been accepted by our courts as an unquestioned part of the common law. He says (§ 1784): 'Thus it has been frequently held to be a misdemeanor, of the nature of malicious mischief, to kill an animal belonging to another, though it has never been held larceny so to kill and take, unless some benefit was expected by the taker.' And he cites, in support of such statement, among other cases, *Com. v. Leach*, 1 Mass. 59; *People v. Smith*, 5 Cow. 258; *Loomis v. Edgerton*, 19 Wend. 420. The conclusion is sustained by the authorities.

"It was a serious matter for the defendant whether he should be convicted of grand larceny upon facts which he claimed could only constitute malicious mischief. He had the right to have the distinction pointed out to the jury. He requested it, but it was not done. Thus the court neglected and refused to point out the essential ingredient of the crime of grand larceny, whereby the defendant may have been convicted of a felony, while the facts and the charge

must include a trespass, and that the taking must be under such circumstances, as that the owner might maintain an action of trespass. It follows, therefore, that the prosecutor must be in the actual or constructive possession of the property at the time of the taking. The application of these principles has been a fruitful source of litigation, and distinctions and refinements, which have rendered the administration of criminal justice in this class of cases exceedingly difficult. *People v. McDonald*, 43 N. Y. 61. And without this element the offense is not complete. 1 Hawk. P. C. p. 108, § 1; 2 Russell, Crimes (5th Am. ed.) 95; *Hilderbrand v. People*, 56 N. Y. 394, 15 Am. Rep. 435. Even although the owner is induced to part with his property by fraudulent means, yet if he actually intends to part with it, and delivers up possession absolutely, it is not larceny. *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123.

It is doubtless a general rule that every larcenous taking must be such as that trespass would lie therefor. Then another is, that trespass will not lie, unless the owner of the property is in the actual or constructive possession at the time of taking. Then another, that such possession must have existed apart from the charge of the property of the custodian; and that neither the civil nor the criminal action will lie, when such possession has been had only through his custody of it. But there have been some modifications of these rules. One is, that larceny may be charged, in such case, when the felonious appropriation is after the property reaches its ultimate destination. *People v. Phelps*, 72 N. Y. 334.

§ 450. **Corpus Delicti must be Shown.**—Every criminal charge necessarily involves two distinct propositions: (1) That a criminal act has been committed; (2) that the guilt of such act

were equally applicable to a misdemeanor. The learned county judge very properly and fully recognized the serious importance of this question when he stayed the execution of the sentence pending an appeal."

The presiding justice Learned entered a vigorous dissent from the conclusions of his associates. While I have no wish to intrude upon this controversy, I cannot refrain from the observation that on principle and authority, the dissenting view must be regarded as correct. The very opening sentence of *Judge Learned's* opinion is so ruthlessly logical, as to silence all argument in favor of the contrary rule. He says: "*I cannot see why it is not as felonious to take another's property, with intent to injure him, as to do the same act in order to benefit the taker. Indeed, the former is the more malicious act of the two.*"

attaches to the particular person charged with the commission of the offense. In cases of larceny it is, of course, essential for the prosecution to prove that the property was feloniously taken from the person named in the indictment as the owner. "It must appear that the goods were stolen from the prosecutor; and if he, being a witness, cannot swear to the loss of the articles alleged to have been stolen from him, the prisoner must be acquitted." 3 Greenl. Ev. § 161.

In what manner may this proof be made? Must it always be direct and positive? Is it absolutely essential, in all cases, that the proof of the *corpus delicti* should be first established independent of the other elements of the offense? While it is true that a person charged with the commission of a criminal offense is not called upon to answer the charge without satisfactory proof, upon the part of the prosecution, of the *corpus delicti*, yet it is not essential, in all cases, that there should be any direct evidence upon this point.

Many of the cases are referred to in a note to 1 Bishop, Crim. Proc. § 1071. Some of them are cases like *People v. Williams*, 57 Cal. 108, where no evidence of any kind was offered upon that point. Bishop concludes the section by saying: "If we look at the matter as one of legal principle, we can hardly fail to be convinced that while the *corpus delicti* is a part of the case which should always receive careful attention, and no man should be convicted until it is in some way made clear that a crime has been committed, yet there can be no one kind of evidence to be always demanded in proof of this fact any more than of any other. If the defendant should not be convicted when there has been no crime, so equally should he not be when he has not committed the crime, though somebody has; the one proposition is as important to be maintained as the other, yet neither should be put forward to exclude evidence which in reason ought to be convincing to the understanding of the jury."

In *State v. Keeler*, the court said: "The rule should be adhered to, with the utmost and strictest tenacity, that the facts forming the basis of the offense, or *corpus delicti*, must be proved either by direct testimony, or by presumptive evidence of the most cogent or irresistible kind. In one of these methods the essential fact or facts must be established beyond a reasonable doubt. But if thus established, or if the jury can be or are satisfied of such

facts beyond this reasonable doubt, it matters not whether they are conducted to this result by direct or positive evidence. In other words, while the proof should be clear and distinct, it is not necessary that it should be direct and positive; for while that which is direct might be more satisfactory, less liable to deceive and mislead, this goes to its weight or effect, and by no means establishes that in no other way can the essential facts be shown with the requisite distinctness and clearness." 28 Iowa, 553.

The fact that the *corpus delicti* may be established by circumstantial evidence is well settled. Burrill, Circ. Ev. 680, 734; Wills, Circ. Ev. 201; *Reg. v. Burton*, Dears. C. C. 282; *Rex v. Burdett*, 4 Barn. & Ald. 122; *McCullough v. State*, 48 Ind. 112; *Brown v. State*, 1 Tex. App. 155; *Roberts v. State*, 61 Ala. 401; *State v. Ah Chuey*, 14 Nev. 92, 33 Am. Rep. 530; *State v. Lovell*, 17 Nev. 427, and authorities there cited.

§ 451. What may be Shown when Identity is in Question.

—It is an established rule of evidence, that, "when, on a trial for larceny, identity is in question, testimony is admissible to show that other property, which had been stolen at the same time, was also in the possession of the defendant when he had in possession the property charged in the indictment." Whart. Am. Crim. L. § 50. This principle is sustained by reason as well as authority. When several articles are taken at one time, and "the transaction is set in motion by a single impulse and operated by a single uninterrupted force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up into a series of indictments, no matter how long a time the act may occupy." 2 Whart. Am. Crim. L. § 1817. The court of North Carolina has gone further, and allowed evidence of a different offense of the same character, and connected with that charged in the indictment, in order to show guilty knowledge, where the intent is of the essence of that charged. *State v. Murphy*, 84 N. C. 742; *State v. Thompson*, 97 N. C. 496; *State v. Parish*, 104 N. C. 679; 1 Whart. Am. Crim. L. § 649.

In *People v. Ball*, 14 Cal. 101, 73 Am. Dec. 631, the subject of the larceny was described as "three thousand dollars lawful money of the United States." The court said: "This description is not sufficient. In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country, of a particular denomination, according to the facts.

The species of coin must be specified. Archb. Crim. Pr. & Pl. 61; Whart. Am. Crim. L. 132." See *Barton v. State*, 29 Ark. 68.

§ 452. **Recent Possession of Stolen Property may be Shown.**—In a prosecution for larceny, the fact that the stolen property is found upon the person of the defendant can always be given in evidence against him, but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case. *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. In the case of *State v. Hodge*, 50 N. H. 510, a leading and well considered case, the supreme court of New Hampshire decided that the presumption thus raised was one of fact, and not of law; that there is no legal rule on the subject; that much depends on the nature of the property stolen, and the circumstances of each particular case; that "it is a presumption established by no legal rule, ascertained by no legal test, measured by no legal standard, bounded by no legal limits. It has none of the characteristics of law. Whether it be found by the judge or the jury, the judge and the jury must be equally unconscious of finding in it any semblance of a legal principle, however much good sense may appear in the result arrived at. Being a presumption of fact, it should, according to our practice, be drawn by the jury, and not by the court." We regard this case as well sustained by the adjudications.

There can be no doubt as a general proposition of law, that the exclusive possession of goods recently stolen is sufficient to put an accused person upon his defense. *McLain v. State*, 18 Neb. 154. It is not very well settled what is a recent possession. Neither is it positively established whether the presumption mentioned so often in the books and decisions, is a presumption of law or fact. Mr. Bishop contends that upon principle it is only a presumption of fact, the inference to be drawn by the jury; and the writer agrees with Mr. Bishop on this point. 2 Bishop, Crim. Proc. (2d ed.) §§ 740, 745; *People v. Gassaway*, 23 Cal. 51; *Curtis v. State*, 6 Coldw. 9; *State v. Williams*, 47 N. C. 194. If a presumption of law, it is only in those cases where it is manifest that the stolen goods have come to the possessor by his own act or with his undoubted concurrence. The original cases mentioned which were sufficient to raise a presumption of law are as follows: "Upon an indictment for stealing in a dwelling-house, the defendant is apprehended a few yards from the outer door with the stolen goods

in his possession." "A gentleman has his watch stolen from his fob in a crowd, and shortly thereafter it is found concealed about the person of one who can give no rational account of how he obtained it." *Malone*, *Crim. Briefs*, 396.

"Generally whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously." 2 *East*, *Crim. L.* 656. This was cited with approbation in the case of *State v. Furlong*, 19 *Me.* 225, and its accuracy as a general legal proposition, is sustained by the decision made in the case of *Knickerbacker v. People*, 43 *N. Y.* 177, 1 *Cow. Crim. Rep.* 287.

Evidence in explanation of such possession may fall short of a satisfactory explanation, and yet be sufficient to acquit. If it creates a reasonable doubt, it practically rebuts the presumption of guilt. *Clackner v. State*, 33 *Ind.* 412; *Way v. State*, 35 *Ind.* 409; *Smith v. State*, 58 *Ind.* 340.

It is well settled law that the exclusive possession of a whole or some part of stolen property by the prisoner, recently after the theft, is sufficient when standing alone to cast upon him the burden of explaining how he came by it, or of giving some explanation; and if he fail to do so, to warrant the jury in convicting him of the larceny. Such is and has been the practice of the criminal courts in this country and England, as appears by the reports and by elementary writers. *Best*, *Presumptions*, (31 *Law Lib. N. S.* *304). In the 5th ed. p. 292 of this work, the rule is repeated and affirmed; but the author seems disposed to limit the rule, on the authority of Bentham. 3 *Bentham*, *Judicial Ev.* 39-40.

But the reasoning of Bentham has been founded upon the idea that the possession is frequently not exclusive; but may be in many, therefore not criminative of either, and other illustrations, showing the necessity of exclusive and conscious possession, etc. See also 1 *Cowen & Hill's Notes*, p. 425, note 325. These are sound limitations. *Wills*, *Circ. Ev.* (4th ed.) 53, 54. *Russell on Crimes* says, in such case, "it is incumbent on the person so found in possession, to prove how he came by it, otherwise the presumption is that he obtained it feloniously." *Russell, Crimes*, (4th ed. by *Graves*) 337, *123; 2 *East*, *P. C.* 656. *Greenleaf*, in his first volume lays down the rule broadly that "possession of the fruits

of crime, recently after its commission, is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence, by the attending circumstances, by the habits of life and character of the prisoner or otherwise, it is taken as conclusive." 1 Greenl. Ev. (rev. ed.) § 34. In his third volume, he modifies this rule, but without any authority except a reference to Best, Presumptions. Wills, Circ. Ev. and Alison, Principles of the Criminal Law of Scotland, p. 320, and they do not sustain him.

§ 453. **Evidence of other Similar Offenses.**—If other criminal acts can be received, as they most certainly have been, with the sanction of the courts, for the purpose of proving the intent with which the act charged as criminal was committed, no good reason exists for excluding it in prosecutions for larceny. The intent is the vital fact to be ascertained; and other acts, plainly within one common purpose or design, have been allowed as legal evidence of it. In treason, murder, robbery, arson, embezzlement, fraud, receiving stolen goods (*Copperman v. People*, 1 Hun, 15, affirmed in 56 N. Y. 591) and other cases, such acts, as proof of intent, have been received, and no reason appears why larceny should not be included in the same principle.

In *State v. Renton*, 15 N. H. 174, Gilchrist, *J.*, very aptly remarked: "Where a person is charged with an offense, it is important to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to be prepared to answer. It is, therefore, not competent for the prosecutor to give evidence of facts tending to prove another distinct offense, for the purpose of raising an inference that the prisoner has committed the crime in question. Nor is it competent to show that he has a tendency to commit the offense with which he is charged." *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

§ 454. **Case of Reg. v. Thomas Considered.**—One of the most eminent of the English *nisi prius* judges of the present day has imparted an element of distrust to this entire subject that has been of extended influence in this country, and is widely quoted as sustaining a position of great importance to one accused of crime. The decision referred to is that of *Reg. v. Thomas*, 9 Car. & P. 741. In that case the prosecutor gave the prisoner a sovereign to get changed, the prisoner failed to materialize with the equivalent, and the court held that he could not be convicted

of larceny because the prosecutor had voluntarily divested himself without the least expectation of its return.

It is idle to speculate upon the reasoning which inspired this decision. Suffice it to say that it has been unqualifiedly condemned by a court of very high repute in this country.

It is an error to suppose that the doctrine of the case of *Reg. v. Thomas* had been adopted by the New York court of appeals. In the case of *Hilderbrand v. People*, 56 N. Y. 394, 15 Am. Rep. 435, where this court is supposed to have adopted that rule, the plaintiff in error had been convicted of stealing a \$50 bill handed him to take out ten cents in payment for a glass of soda. The prisoner put down a few coppers upon the counter, and, when asked for the change, took the prosecutor by the neck and shoved him out of doors and kept the money. The prisoner was convicted, and the conviction was affirmed by this court. The case of *Reg. v. Thomas* was cited and relied upon by the prisoner. The facts of the two cases differed, and, after criticising the case of *Reg. v. Thomas* as a *nisi prius* case and not authoritative for that reason, the court pointed out the difference between the facts of the case then being considered, without overruling or affirming the doctrine of *Reg. v. Thomas*.

In *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123, the case of *Reg. v. Thomas*, was again referred to, and this court there declared that the weight of authority was decidedly opposed to the doctrine of that case, and again affirmed a conviction in which that case was relied upon as an authority for reversal. The decisions of this court have been uniformly against the doctrine of *Reg. v. Thomas*. In *People v. McDonald*, 43 N. Y. 61, this court held that: "If money or property is delivered by the owner to a person for mere custody or for some specific purpose, the legal possession remains in the owner, and the criminal conversion of it by the custodian is larceny." Again in *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474, it was said by Allen, *J.*, that "when the delivery of goods is made for a single and specific purpose the possession is still supposed to reside, not parted with, in the first proprietor." The rule of *Reg. v. Thomas* was never adopted by this court, is not good law, and should be disregarded.

§ 455. **Evidence of Value.**—Without proof of the value of stolen property, there can be no conviction of larceny; and unless the record shows that there was such proof, the court will set

aside a conviction, although the error was not pointed out by the counsel; and this, notwithstanding the property stolen was currency as the United States silver certificates. It is always necessary to prove the value of the property alleged to have been stolen, in order to determine the grade of the offense and the penalty to be imposed; and in the absence of any evidence upon the subject of such value, the court must presume it to be nominal merely. But where the punishment of the offense charged does not depend on the value of the articles taken, proof of value is unnecessary, and the jury may ascertain whether or not the articles are of any value by inspecting them. *Rapalje, Larceny & Kindred Offenses*, § 140, citing *Ware v. State*, 33 Ark. 567; *Whitehead v. State*, 20 Fla. 841; *Radford v. State*, 35 Tex. 15; *Hall v. State*, 15 Tex. App. 40; *Moore v. State*, 17 Tex. App. 176; *State v. Krieger*, 68 Mo. 98; *Simpson v. State*, 10 Tex. App. 681; *Powell v. State*, 88 Ga. 32; *Stokes v. State*, 58 Miss. 677; *People v. Griffin*, 38 How. Pr. 475; *Com. v. Burke*, 12 Allen, 182.

The value of an article stolen is its market value; and evidence that it is worth \$20 to its owner, and worth nothing to anybody else, does not show its market value to be \$20. To be of the market value of \$20 it must be capable of being sold for that sum at a fairly conducted sale,—at a sale conducted with reasonable care and diligence in respect to time, place and circumstances, for the purpose of obtaining the highest price. *Locke v. State*, 32 N. H. 106; *State v. Ladd*, 32 N. H. 110; *State v. Goodrich*, 46 N. H. 186; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 481; *State v. James*, 58 N. H. 67.

If the value, as alleged in the indictment, be the same as proved upon the trial, the verdict of guilty, as alleged in the indictment, is proper. If the value alleged in the indictment should be different from that established from the evidence, the jury, in rendering a verdict of guilty, may find and state with their verdict the amount of loss resulting from the offense, etc. This view, as to the effect of a general verdict, appears to me to be sustained by the reasoning in the case of *Williams v. People*, 24 N. Y. 405. It is true that the question was not raised in that case, but it would appear to follow from the argument employed. In Wisconsin, however, the question appears to have been settled in the case of *State v. White*, 25 Wis. 359, in which it was held that a general verdict of guilty is a finding of the truth of all the ma-

terial averments in the indictment, including the averment of value when value is material. To the same effect also is the case of *Schoonover v. State*, 17 Ohio St. 294.

In charging a larceny of several articles of the same kind, it is not necessary to state the number nor to allege the value of each article. It is sufficient to allege a larceny of divers of the articles of an aggregate value. This is a common mode of charging larceny of bank-notes and of coin. *Com. v. Hussey*, 111 Mass. 432; *Com. v. Stebbins*, 8 Gray, 492; *Com. v. Grimes*, 10 Gray, 470, 71 Am. Dec. 666; *Com. v. Gallagher*, 16 Gray, 240; *Com. v. Butts*, 124 Mass. 449; *Com. v. Collins*, 138 Mass. 483.

§ 456. **New York Rule as to Name of Party Defrauded.**—Formerly, before the adoption of the code of criminal procedure, it was the inflexible rule that the name of the person in whom property was laid, although matter of description, must be proved according to the indictment. But the rule is now changed by the code of criminal procedure. N. Y. Code Crim. Proc. § 293.

The constitutionality of this provision was recognized without question in *People v. Poucher*, 1 N. Y. Crim. Rep. 544; and was upheld by a divided court in *People v. Johnson*, 4 N. Y. Crim. Rep. 591.

The constitutionality of similar statutory provisions has been recognized without question by the highest courts of several of the states. *Mulrooney v. State*, 26 Ohio St. 326; *Com. v. O'Brien*, 2 Brewst. 566; *Haywood v. State*, 47 Miss. 1.

§ 457. **Review of Miscellaneous Authorities.**—If property is parted with voluntarily upon contract, the offense is not larceny. Penal Code, § 528; *People v. Morse*, 3 N. Y. Crim. Rep. 104; *Zink v. People*, 77 N. Y. 114, 33 Am. Rep. 589; *People v. Cruger*, 102 N. Y. 510, 55 Am. Rep. 830; *Mowrey v. Walsh*, 8 Cow. 238; *Andrews v. Dieterich*, 14 Wend. 31; *Ross v. People*, 5 Hill, 294; *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474; *Thorne v. Turck*, 94 N. Y. 90, 46 Am. Rep. 126; *People v. Baker*, 96 N. Y. 340; *Kelly v. People*, 6 Hun, 509; Cowen, Crim. Dig. 320.

It is not larceny if the owner intends to part with the property, and deliver the possession absolutely, although he has been induced to part with the goods by fraudulent means. If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo*.

furandi, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses. *Ross v. People*, 5 Hill, 394; *Lewer v. Com.* 15 Serg. & R. 93; 2 Russell, Crimes, 28.

In prosecutions for larceny and receiving, several articles may be joined in a count, and the proof of one of them will sustain the indictment. A *nolle prosequi* may be entered on a portion of a divisible count, even after verdict. If several articles are embraced in a count for larceny, and one of them is sufficiently described and the others are not, it is not necessary to quash the indictment. In such case, it is proper to amend by striking out the articles defectively specified, or to enter a *nolle prosequi* as to them. Indeed, to quash an indictment on such ground might effectually defeat justice, as where the statute of limitations would be an answer to a new bill for the larceny of the article which was adequately described in the quashed indictment. A defective description of an article in a divisible count for larceny is analogous to a bad count in an indictment. In the latter case a general verdict will be supported, and referred to the good counts unless it appear that evidence was received which was admissible only under the bad counts. *Com. v. Johnson*, 133 Pa. 293.

Where an indictment for grand larceny charged the act constituting the crime thus, that defendant "unlawfully and feloniously did steal, take and carry away" the property described. Held, that the indictment could not be sustained by proof that the defendant obtained possession of the property from the owner upon a sale on credit induced by false and fraudulent representations. *People v. Dumar*, 106 N. Y. 502.

The statute defining larceny is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction; and an indictment charging larceny in the common law form, if sustained by evidence, justifies a conviction for larceny committed in any of the ways now known to the law. *People v. Enoch*, 13 Wend. 176, 27 Am. Dec. 197; *People v. White*, 22 Wend. 176; *Fitzgerrold v. People*, 37 N. Y. 413; *Kennedy v. People*, 39 N. Y. 245; *Cox v. People*, 80 N. Y. 500; *People v. Conroy*, 97 N. Y. 62.

Where the owner of personal property entrusts it to another,

to procure a loan thereon, and the latter procures the loan as authorized, his omission to account for, or appropriation of the proceeds of the loan will not sustain an indictment against him for larceny of the property. *People v. Cruger*, 102 N. Y. 510, 55 Am. Rep. 830.

Evidence of embezzlement will not support a conviction of larceny. *Com. v. Simpson*, 9 Met. 138; *Com. v. King*, 9 Cush. 284.

In *People v. McDonald*, 43 N. Y. 61, it is said: "If money or property is delivered by the owner to a person for mere custody, or for some specified purpose, the legal possession remains in the owner, and the criminal conversion of by the custodian is larceny. A familiar illustration of this rule is the case of servants entrusted with the care of property belonging to their masters." In *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474, it was said by Allen, J.: "The rule is, that when the delivery of goods is made for a single and specific purpose, the possession is still supposed to reside, not parted with, in the first proprietor."

In theft, general or from the person, the taking must be without the consent of the owner, or, though lawful (with consent) the possession of the property must be obtained by some false pretext, or with intent to deprive the owner of the value of the property and appropriate it to the use of the taker, with an actual appropriation. If there be consent to the taking, and this consent is not obtained by false pretext, or there is no intent to deprive the owner of the value, accompanying the taking, there can be no theft. *Graves v. State*, 25 Tex. App. 333.

"If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. But if he takes, with like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." *Baker v. State*, 29 Ohio St. 184.

In *Com. v. Uprichard*, 3 Gray, 434, 63 Am. Dec. 762, the property had been stolen in the province of Nova Scotia, and thence carried by the thief into Massachusetts. The defendant was convicted of larceny, charged to have been committed in the latter state. This conviction was set aside by a unanimous court,

although two decisions had been made by the same court confirming convictions, where the property had been stolen in a sister state, and afterward brought by the thief into that commonwealth. Without overruling the older cases, *Chief Justice* Shaw, in delivering the opinion of the court, distinguished between the two classes of cases. The following cases are in point, that a state, into which stolen goods are carried by a thief from a sister state, has no jurisdiction to convict for the larceny of the goods, and *a fortiori* when the goods were stolen in a foreign country.

In New York: *People v. Gardiner*, 2 Johns. 477; *People v. Schenck*, 2 Johns. 479. The rule was afterwards changed in that state by statute. New Jersey: *State v. Le Blanch*, 31 N. J. L. 82. Pennsylvania: *Simmons v. Com.* 5 Binn. 617. North Carolina: *State v. Brown*, 2 N. C. 100, 1 Am. Dec. 548. Tennessee: *Simpson v. State*, 4 Humph. 456. Indiana: *Beall v. State*, 15 Ind. 378. Louisiana: *State v. Reonnals*, 14 La. Ann. 276.

There are two cases sustaining convictions for larceny in the states, where the property had been stolen in the British provinces: *State v. Bartlett*, 11 Vt. 650, and *State v. Underwood*, 49 Me. 181, 77 Am. Dec. 254; *Stanley v. State*, 24 Ohio St. 166, 15 Am. Rep. 604.

CHAPTER LIII.

EMBEZZLEMENT, ROBBERY AND BURGLARY.

- § 458. *Embezzlement Defined.*
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§ 458. **Embezzlement Defined.** — Embezzlement is distinguished from larceny properly so called as being committed in respect of property which is not at the time in the actual or legal possession of the owner. 1 Burrill, Law Dict. 415.

The fraudulently removing and secreting of personal property, with which the party has been entrusted, for the purpose of applying it to his own use. Bouvier, Law Dict. 522.

The chattel, money, or valuable security embezzled by the prisoner must be such as has not come to the possession of his master; if it has come to his possession, the offense is larceny, and not embezzlement. Roscoe, Crim. Ev. 445.

Embezzlement is the fraudulent appropriation of another's property by one who has the lawful custody. It is distinguished from larceny by the fact of lawful custody. It is the peculiar crime of those employed or trusted by others.

This is not a common law offense, but is a general statutory offense. Browne, Crim. L. 48.

Larceny cannot be committed of things that are not the subject of property, as of a dead body. *Rex v. Duffin*, Russ. & R. 366; *King v. Lynn*, 2 T. R. 733.

Funds appropriated under a claim of right are not embezzled, and it may be generally affirmed that only such property as can be the subject of *larceny* is subject to embezzlement. *Ross v. Innis*, 35 Ill. 487.

§ 459. **What must be Established to Warrant Conviction.**—To warrant the conviction of an agent for the embezzlement of his principal's money, four facts must be established beyond a doubt, to wit: First, The agency whereby the defendant was charged with the duty of receiving the money; Second, His receipt of his principal's money; Third, That he received it in the course of his employment; and Fourth, That he embezzled, misapplied or converted it to his own use. *Rapalje, Larceny & Kindred Offenses*, § 389, citing *Webb v. State*, 8 Tex. App. 310.

Under these rules it is apparent that to sustain an indictment for embezzlement against the treasurer of a corporation for the alleged conversion of its moneys, it must be shown that the money came into the possession of the accused or under his control by virtue of his office as treasurer. *Bartow v. People*, 78 N. Y. 377; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Bradlaugh v. Reg.* L. R. 3 Q. B. Div. 607.

§ 460. **Evidence of other Fraudulent Acts Admissible.**—*Reg. v. Richardson*, 2 Fost. & F. 343, was a charge of embezzlement against a clerk who made out weekly accounts of his payments. On three occasions within six months he entered the payments correctly, but, in adding them up, made the totals £2 greater than they were, and took credit for the larger amounts. These were the cases on which the indictment was founded. Evidence that, on a series of occasions before and afterwards, precisely similar errors had been made and advantage taken of by him, was received to show that the errors in the three instances to which the indictments related were intentional and fraudulent, and not accidental. *Com. v. Tuckerman*, 10 Gray, 173, 200, was a charge of embezzlement. The court said: "Where the intent of the accused party forms any part of the matter in issue, evidence may always be given of other acts not in issue, provided they tend to establish the intent imputed to him in committing the act." *Com. v. Shepard*, 1 Allen, 575, 581, was another case of embezzlement. It was held that evidence of another act of embezzlement by the defendant, during the same week, was competent on the question of intent.

§ 461. **The Term "Robbery" Defined.**—"Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of any one in his company at the time of the robbery. To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery. . . . The degree of force is immaterial." N. Y. Penal Code, §§ 224, 225. See *People v. Foley*, 9 N. Y. S. R. 24.

"The felonious and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242. See also *Bloomer v. People*, 1 Abb. App. Dec. 146.

§ 462. **What Evidence is Competent to Establish.**—Evidence is competent which shows the snatching a thing from the hands of another, accompanied with violence, or threats creating apprehensions of bodily harm, or resistance however slight, as this constitutes robbery. *Evans v. State*, 80 Ala. 4.

The supreme court of Iowa in a recent case (*State v. Calhoun*, 72 Iowa, 432) in passing upon the merits of certain instructions given by the trial court to the jury, has established certain propositions relating to the crime of robbery that directly involve positive rules of evidence. The court says: "It is not necessary, in order to constitute a stealing and carrying away 'in the immediate presence of said Nellie Baldwin,' that it should have been done (if done) in her immediate view, or where she could see it done. And if you find from the evidence, beyond a reasonable doubt, that the defendant made a violent assault upon said Nellie, by choking her and causing her to fall upon the floor of one of the rooms or apartments of her house, and then tied her hands and feet for the purpose and with the intention of stealing some money or property in the house; and you further so find that she, through fear of personal violence, told defendant where her money or watch was in an adjoining room or rooms; and you further so find that thereupon defendant passed through a door or doors into such room or rooms, and did there, within hearing of said Nellie Baldwin, take and carry away from said room or

rooms the property described in the indictment, or some part thereof; and you further so find that such property was under her immediate control, and that such taking, if any, was against the will of the said Nellie Baldwin, and was without any right, or claim of right, of defendant in said property, and with the intent to deprive her thereof,—then and in such case there would be a sufficient stealing and taking from the ‘immediate presence’ of the said Nellie Baldwin within the meaning of the law.”

Evidence of the mere snatching of anything from the hand of another in the absence of any struggle or resistance by the owner or any force or violence on the part of the thief is insufficient proof of robbery. *McCloskey v. People*, 5 Park. Crim. Rep. 299; *People v. Hall*, 6 Park. Crim. Rep. 642; *People v. McGinty*, 24 Hun, 64.

The evidence must disclose the felonious intent, and as in cases of larceny, the taking of the property must be *animo furandi*.

Where a scuffle takes place between the prosecutor and the accused, in the course of which the former was deprived of a ruling measure, his hat, and a quantity of articles out of his pockets, which were afterwards found by the roadside; but as it turned out that he was tipsy at the time, and the articles might have been lost in the struggle, without any intent of felonious appropriation on the prisoner’s part, he was acquitted. *Bruce’s Case*, Alison, Prin. Crim. Law of Scotland, 358.

Mere trick or contrivance by which possession of the property is obtained, if unaccompanied by violence, will not amount to robbery. *Huber v. State*, 57 Ind. 341.

The taking of property from the person of another is robbery, when it appears that although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force or fear.

The violence contemplated means more than a simple assault and battery. It must be sufficient to force the person to part with his property not only against his will but in spite of his resistance. *McCloskey v. People*, 5 Park. Crim. Rep. 299.

Secretly picking a pocket is no robbery. The victim must be under the influence of fear. *Norris’ Case*, 6 City Hall Rec. 86; *Mahoney v. People*, 5 Thomp. & C. 329.

Upon a trial for robbery in the first degree, the taking of property from the person by force and violence was clearly proved. A strong array of circumstances was proved, pointing to the

prisoner as the person who committed the offense. Held, that the question of the prisoner's guilt was properly submitted to the jury. *Bloomer v. People*, 3 Keyes, 9.

A party in possession of a chattel is, to all intents, the legal owner, except as to the rightful owner, and especially as against any wrongdoer or criminal trespasser. *Rex v. Deakin*, 2 Leach, C. C. 862; *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551, and cases therein cited; *State v. Addington*, 1 Bail. L. 310. The age of the person in possession of the goods cannot be material. *People v. Kendall*, 25 Wend. 399, 37 Am. Dec. 240.

The cases abundantly sustain the position, that an averment of ownership in the person having the actual possession and control of the thing stolen at the time of the theft, is all that is required. *People v. Bennett*, *supra*, and cases cited.

It is held in *People v. McDonald*, 43 N. Y. 61, that if money or property is delivered by the owner to a person for mere custody or charge, or for some specific purpose, the legal possession remains in the owner, and a criminal conversion of it by the custodian is larceny.

§ 463. **Views of Professor Greenleaf.**—Professor Greenleaf, says (3 Greenl. Ev. § 231): “Evidence that the money or goods were obtained from the owner by putting him in fear, will support the allegation that they were taken by force. And the law, *in odium spoliatoris*, will presume fear, wherever there appears a just ground for it. The fear may be of injury to the person; or, to the property; or, to the reputation; and the circumstances must be such as to indicate a felonious intention on the part of the prisoner. The fear, also, must be shown to have continued upon the party up to the time when he parted with his goods or money; but it is not necessary to prove any words of menace, if the conduct of the prisoner were sufficient without them; as, if he begged alms with a drawn sword; or, by similar intimidation, took another's goods under color of a purchase, for half their value, or the like. It is only necessary to prove that the fact was attended with those circumstances of violence or terror, which, in common experience, are likely to induce a man unwilling to part with his money for the safety of his person, property, or reputation.” The distinguished author cites in support of the propositions of his text the following authorities: *Clary v. State*, 33 Ark. 561; *Dill v. State*, 6 Tex. App. 113; *Shinn v. State*, 64

Ind. 13, 31 Am. Rep. 110; *State v. Howerton*, 58 Mo. 581; Foster, Crim. L. 128, 129; 2 East, P. C. 711, 712.

§ 464. The Terms "Fear" and "Violence" Considered.—

It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is nowhere defined in any of the acknowledged treatises upon this subject. Lord Hale proposes to consider what shall be said to a putting in fear; but he leaves this part of the question untouched. 1 Hale, P. C. 534. Lords Coke and Hawkins do the same. 3 Coke, Inst. 68; 2 Hawk. P. C. chap. 34. *Mr. Justice* Foster seems to lay the greatest stress upon the necessity of the property's being taken against the will of the party, and he lays the circumstance of fear out of the question; or that, at any rate, when the fact is attended with circumstances of violence or terror, the law *in odium spoliatoris* will presume fear, if it be necessary, where there appears to be so just a ground for it. Foster, Crim. L. 123, 128. *Mr. Justice* Blackstone leans to the same opinion. 4 Bl. Com. 242. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist.

The amount and degree of violence which the accused must exert to bring him within the statute defining robbery, are not declared, and they manifestly could not be. The gravamen of the crime consists in taking "the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person." In other words the violence to the person, or the fear of immediate injury to the person, which, against the owner's will, is sufficient to take his property, will, if the taking be felonious, render the taker amenable to the statute. It is not the extent and degree of force which make the crime, but the success thereof. In short, the force which is sufficient to take the property against the owner's will, is all that the statutes contemplate; the distinction between robbery and larceny consists in this, in the latter, the act "is accomplished secretly, or by surprise or fraud, while in the former the felonious taking must be accompanied by circumstances of violence, threats or terror to the person despoiled." 2 East, P. C. 559.

To authorize a conviction of theft of property recently stolen from the fact that the stolen property was in defendant's possession, such possession must be recent and personal, and there must

be a conscious assertion of claim to the property; and a reasonable doubt thereof requires an acquittal. *Clark v. State*, 30 Tex. App. 402.

§ 465. Description of Property Stolen not Required.—

"It would be unreasonable to expect one who is robbed of money or its representative to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber if courts should undertake to require the prosecutor, in all cases, to give a particular description of the money or note feloniously taken. The failure to give an exact description can never endanger the liberty of an innocent man, but the enforcement of such a rule as that for which counsel contend would furnish the guilty with ready and easy means of escape." *Riggs v. State*, 104 Ind. 261.

§ 466. The Terms "Burglary" and "Break" Defined.—

The breaking and entering the house of another in the night-time, with intent to commit a felony therein whether the felony be actually committed or not. *State v. Wilson*, 1 N. J. L. 441, 1 Am. Dec. 216; *Com. v. Newell*, 7 Mass. 247; 3 Coke, Inst. 63; 1 Hale, P. C. 549; 1 Hawk. P. C. chap. 38, § 1; 4 Bl. Com. 224; 2 East, P. C. chap. 15, p. 484, § 1; 2 Russell, Crimes, 2; Roscoe, Crim. Ev. 252. The circumstances to be considered are, 1. In what place the offense can be committed; 2. At what time; 3. By what means; 4. With what intention. Bouvier, Law Dict. 196.

The offense must be committed in the night, for in the day time there can be no burglary. 4 Bl. Com. 224. And the intent must be felonious. 2 Russell, Crimes, 33. Any, the least, entry, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offense. 3 Coke, Inst. 64; 4 Bl. Com. 227; Bac. Abr. title *Burglary*, B; Comyn, Dig. *Justices*, p. 4.

"The word "break," means and includes,

"1. Breaking or violently detaching any part, internal or external of a building; or,

"2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle or other thing used for covering or clos-

ing an opening thereto or therein, or which gives passage from one part thereof to another; or,

"3. Obtaining an entrance into such building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

"4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof." N. Y. Penal Code, § 499.

"It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enters into a house by a door which he finds open, or through a hole which was made there before, and steals goods, etc., or draws anything out of a house through a door or window which was open before, or enters into the house through a door open in the day time, and lies there till night, and then robs and goes away without breaking any part of the house, he is not guilty of burglary." 1 Hawk. P. C. chap. 38, §§ 4, 5.

§ 467. **What the State must Prove.**—"On an indictment for burglary it is essential to prove, 1st, a felonious breaking and entering; 2d, of the dwelling-house; 3d, in the night-time; 4th, with intent to commit a felony.

"In the first place, it is a question of fact for the jury, whether the prisoner has been guilty of any act of breaking; but whether that act amounts to a burglarious breaking, is a pure question of law. There must be evidence of an actual or constructive breaking, for if the entry was obtained through an open door or window, it is no burglary. But the lifting of a latch; taking out a pane of glass; lifting up of folding doors; breaking of a wall or gates which protect the house; the descent down a chimney; the turning of a key where the door is locked on the inside, constitutes a sufficient breaking.

"Where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was sufficient, and no judgment was given.

"Where an entry has been gained without any breaking, a subsequent breaking will constitute the offense; as where the party lifts the latch of a chamber door, or a servant raises the latch of his master's door with intent to murder or rob his master." 2 Stark. Ev. 275.

§ 468. **Presumptive Evidence of.**—Where a burglary is connected with a larceny, mere possession of the stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary.

But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account of the manner in which the goods came into his possession, proof of such possession and guilty conduct is presumptive evidence, not only that he stole the goods, but that he made use of the means by which access to them was obtained.

There should be some evidence of guilty conduct, besides the bare possession of the stolen property before the presumption of burglary is superadded to that of the larceny. *Davis v. People*, 1 Park. Crim. Rep. 447.

§ 469. **What is "Constructive Breaking."**—It has frequently been held in this country, that the evidence must show beyond a reasonable doubt, that the accused obtained admission to a dwelling-house at night, with the intent to commit a felony, by means of artifice or fraud or upon a pretense of business or social intercourse, is a constructive breaking, and will sustain an indictment charging a burglary by breaking and entering. *Johnston v. Com.* 85 Pa. 54, 27 Am. Rep. 622; *Rolland v. Com.* 82 Pa. 306, 22 Am. Rep. 758; *State v. Wilson*, 1 N. J. L. 439, 1 Am. Dec. 216; *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314; Bishop, Statutory Crimes, § 312, and cases there cited. The same was held in Ohio under a statute against "forcible" breaking and entering. *Ducher v. State*, 18 Ohio, 308. But it is claimed that in the state of Wisconsin, the common law doctrine of constructive breaking has no application to a case of this kind, and in fact is superseded by statute, except in so far as it is re-affirmed. Thus: "Any unlawful entry of a dwelling or other building with intent to commit a felony, shall be deemed a breaking and entering of such dwelling-house or other building, within the

meaning of the last four sections." Rev. Stat., § 4411. This section merely establishes a rule of evidence whereby the scope of constructive breaking is enlarged so as to take in "any unlawful entry of a dwelling-house or other building with intent to commit a felony." See *State v. Kane*, 63 Wis. 262. It in no way narrows the scope of constructive breaking, as understood at common law, but merely enlarges it in the particulars named. In all other respects such constructive breaking signifies the same as at common law. It necessarily follows that as the word "break," used in section 4410, had obtained a fixed and definite meaning at common law when applied to a dwelling-house proper or other buildings within the curtilage, the legislature must be presumed to have used it in the same sense when therein applied to other statutory breakings. *Ex parte Vincent*, 26 Ala. 145, 62 Am. Dec. 714; *Ducher v. State*, 18 Ohio, 308; Bishop, Statutory Crimes, §§ 7, 88. That is to say they must be deemed to have used the word as understood at common law in relation to the same or a like subject-matter. *Nicholls v. State*, 68 Wis. 416, 60 Am. Rep. 870.

§ 470. **Evidence of Former Attempts.**—On a trial for burglary, it is no valid objection to evidence, tending to show the burglarious intent of defendant's act, that it proves another and distinct offense, but the intent with which he entered may be shown by proof of a felony committed in an adjoining store. *Osborne v. People*, 2 Park. Crim. Rep. 583; *Phillips v. People*, 57 Barb. 363. In *Mason v. State*, 42 Ala. 532, evidence was held admissible to show that the prisoners had committed other burglaries than that charged. The court says: "The evidence tended to show that there was a privity and community of design between the prisoners to commit offenses of the character charged against them." "Privity and community of design" is a larger phrase than "intent," but it means the same thing. To show their intent, written articles of agreement signed by the defendants, setting forth their intent of going into the burglary business, would be competent. And it would not be necessary that their agreement be reduced to writing. Their oral statements would be equally competent, as in the case of the dealer in counterfeit money, and the intent may be proved by other burglaries, as well as by written or oral statements; by acts, as well as by words written or spoken, by the executed, as well as by the exec-

utory agreement. And in the case of a single defendant, his intent may be shown by the same kind of evidence that would be admissible against several joint defendants, as in the case of the dealer in counterfeit money. Evidence that a man has often passed counterfeit money has a legal tendency to show that he intends to pass more of the same kind of money found in his possession. The number of his previous attempts to pass such money affects the weight, not the competency, of this kind of evidence. So, when A has broken and entered B's house, and the question is whether he broke and entered it with a burglarious intent, evidence of his having repeatedly broken and entered other houses for the purpose of stealing, tends to show the intent with which he broke and entered B's house.

§ 471. **Partial Review of Late Decisions.**—In *People v. Ah Sing*, 59 Cal. 400, the opinion of the court is as follows: "The defendant was proceeded against by information, and convicted of the crime of burglary, and on the trial the court below instructed the jury that the possession of stolen property, supported by other circumstances and other evidence tending to show guilt, is a strong circumstance in the case. This was error, whether the possession was strong evidence, or only slight evidence, tending to show guilt, was a matter for the jury to pass upon, and not a question for the court to determine." In *People v. Titherington*, 59 Cal. 598, wherein the appellant was convicted of burglary, a similar instruction was held erroneous, the court below having said that "such possession, if proven to the satisfaction of the jury, and unexplained by the defendant, supported by other circumstances tending to show guilt, is a strong circumstance tending to show guilt." In *People v. Cline*, 74 Cal. 575, it appeared that the defendant was convicted of grand larceny, and the following instruction was given to the jury: "The possession of stolen property, supporting other evidence tending to show guilt, is a strong circumstance tending to show guilt." The court affirmed the case of *People v. Ah Sing*, *supra*, and Chief Justice Searls, in the opinion, says: "In other words, it is not a question of law, upon which the court should instruct the jury, but one of fact which is wholly within the province of the latter. In adducing the ultimate fact of guilt or innocence, they are the sole judges of the weight to be given to the probative fact of possession of property recently stolen, and of all the circumstances surrounding and stamping the character of such possession."

In *Clary v. State*, 33 Ark. 566, this court said: "Perhaps, on a trial for robbery, if the state fails to prove that the goods were taken from the person or party charged to have been injured, by putting him in fear, or by intimidation or violence, and proves that the goods were taken from his person furtively, the accused might be accused of larceny."

In *State v. Emerson*, 48 Iowa, 174, substantially the same question arose, and the court said: "When a reasonable doubts exists as to the character of the recent possession, whether it be innocent or guilty, a reasonable doubt exists as to the defendant's guilt. If such doubt exists he cannot be convicted. Now, such a doubt may arise in the minds of the jury upon less than a preponderance of the evidence. It was therefore erroneous to direct the jury that they could find the defendant guilty, unless defendant, by a preponderance of the testimony, reasonably satisfied them that his possession of the cattle was innocent." See also *State v. Henry*, 48 Iowa, 403; *State v. Merrick*, 19 Me. 398; *Hall v. State*, 8 Ind. 439; *Heed v. State*, 25 Wis. 421.

A family vault in a cemetery is a "building or erection or enclosure," as defined in the penal code, and a person who breaks and enters the same with intent to commit a crime therein, is guilty of burglary in the third degree." *People v. Richards*, 5 N. Y. Crim. Rep. 355.

CHAPTER LIV.

MURDER AND MANSLAUGHTER.

- § 472. *Distinction between Murder and Manslaughter.*
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- 483. *Evidence of Death by Poisoning.*
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§ 472. **Distinction between Murder and Manslaughter.**—Voluntary manslaughter often so nearly approaches murder, it is necessary to distinguish it clearly. This difference is this: Manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences or cruelty, being sometimes a willful act, as the term “voluntarily” denotes. It is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. Therefore, to reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause or provocation, and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting, if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder.

“Murder . . . is the voluntary killing of any person . . . of malice pretense or aforethought, either express or implied, by

law; the sense of which word malice is not only confined to a particular ill will to the deceased, but is intended to denote, as *Mr. Justice Foster* expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief. And therefore malice is implied from any deliberate, cruel act against another, however sudden." § 2.

"Manslaughter is principally distinguishable from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter; and, the act being imputed to the infirmity of human nature, the correction ordained for it is proportionally lenient." § 4.

"The implication of malice arises in every instance of homicide amounting, in point of law, to murder; and in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him." § 12.

"Whenever death ensues from sudden transport of passion or heat of blood, if upon a reasonable provocation and without malice, or if upon sudden combat, it will be manslaughter; if without such provocation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder." § 19.

"Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures, without an assault upon the person; nor is any trespass against lands or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or to do some great bodily harm. But if he had given the other a box on the ear, or had struck him with a stick, or other weapon not likely to kill, and had unluckily and against his intention killed him, it had been but manslaughter." 1 East, P. C. chap. 5, §§ 2, 4, 12, 19, 20.

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact

of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt.

§ 473. **Degrees of the Offense.**—"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed, either,

1. From a deliberate and premeditated design to effect the death of the person killed, or of another, or

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or,

3. When perpetrated in committing the crime of arson in the first degree.

"Such killing of a human being is murder in the second degree, when committed with a design to affect the death of the person killed, or of another, but without deliberation and premeditation.

"Such homicide is manslaughter in the first degree, when committed without a design to effect death, either

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another; or

2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon.

"Such homicide is manslaughter in the second degree, when committed without a design to effect death, either

1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of a person killed, or of another, not amounting to a crime; or,

2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree. See N. Y. Penal Code, §§ 183, 184, 189, 193.

In jurisdictions where murder is divided into two degrees, murder in the first degree requiring deliberation and premeditation,

in other words, actual malice, it has been frequently held that evidence of mental excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter. On this point see *Jones v. Com.* 75 Pa. 403; *McIntyre v. People*, 38 Ill. 520; *Rafferty v. People*, 66 Ill. 118, 18 Am. Rep. 601; *People v. Rogers*, 18 N. Y. 27, 72 Am. Dec. 484; *Com. v. Hawkins*, 3 Gray, 463; *People v. Belencia*, 21 Cal. 544; *Pirtle v. State*, 9 Humph. 663; *Haile v. State*, 11 Humph. 155; *Tidwell v. State*, 70 Ala. 33; *Willis v. Com.* 32 Gratt. 929.

“All peculiar traits may be put in evidence to lower the grade of the offense, although they do not amount to insanity.” 1 Whart. Medical Jurisprudence.

“Partial insanity may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused.” Stephen, Dig. 1863, § 92.

In Pennsylvania, the legislature, considering that there is a manifest difference in the degree of guilt, where a deliberate intention to kill exists, and where none appears, distinguishes murder into two grades, murder of the first and murder of the second degree; and, provided that the jury before whom any person indicted for murder shall be tried, shall, if they find him guilty thereof, ascertain in their verdict whether it be murder of the first or murder of the second degree.

§ 474. **When Justifiable.**—Homicide is declared to be justifiable, excusable or felonious. 4 Bl. Com. 176.

Every homicide which is neither justifiable nor excusable must of necessity be “felonious.” Every felonious homicide must be and is either murder or manslaughter. 4 Bl. Com. 190.

Murder and manslaughter are each and both felonies. 2 Bishop, Crim. L. 617.

Therefore every assault feloniously committed with intent to “feloniously kill,” must of necessity be and is a criminal assault, with intent to commit a felony, either murder or manslaughter. An assault with intent to commit either of these crimes is an assault with intent to commit a felony, and is indictable. 2 Bishop, Crim. L. 629.

All statutes providing for the punishment of assaults with intent to commit crime contemplate complete commission of the one offense, the assault, the misdemeanor, with the intent to commit the other complete crime, which would be a felony. *Wilson v. People*, 24 Mich. 410.

Where a party by one witness has introduced certain testimony, he is not necessarily bound thereby, but that he must give contradictory testimony by another witness or witnesses, and may thereafter in argument claim the benefit of the more favorable portion of such contradictory testimony. *Bullard v. Pearsall*, 53 N. Y. 230; *Howard v. State*, 32 Ind. 478; *Melluish v. Collier*, 15 Q. B. 878; 1 Stark. Ev. 216; 2 Phil. Ev. 985; 1 Greenl. Ev. § 444.

Homicide is also justifiable when committed, either—

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, that there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

The statute above quoted states the general doctrine of the cases. *Kingen v. State*, 45 Ind. 518; *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52; *People v. Anderson*, 44 Cal. 65; *People v. Morine*, 61 Cal. 367; *State v. Newcomb*, 1 Houst. Crim. Rep. 66; *State v. Hollis*, 1 Houst. Crim. Rep. 24; *State v. Vines*, 1 Houst. Crim. Rep. 424; *Davison v. People*, 90 Ill. 221; *State v. Bohan*, 19 Kan. 28, 55; *State v. Rose*, 30 Kan. 501; *Kennedy v. Com.* 14 Bush, 340; *Farris v. Com.* 14 Bush, 362; *Minton v. Com.* 79 Ky. 461; *State v. Garic*, 35 La. Ann. 970; *State v. Matthews*, 78 N. C. 523; *Draper v. State*, 4 Baxt. 246; *Holt v. State*, 9 Tex. App. 571; *State v. Abbott*, 8 W. Va. 741; *State v. Cain*, 20 W. Va. 679.

§ 475. **Effect and Definition of Provocation.**—"Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm. The following acts

may . . . amount to provocation: (a) An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted. (b) If two persons quarrel and fight upon equal terms and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other whichever is right in the quarrel, and whichever strikes the first blow. (c) An unlawful imprisonment is a provocation to the person imprisoned, but not to the by-standers, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a by-stander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to by-standers. (d) The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part of both the adulterer and of the adulteress. (e) The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offense. (f) Neither words, nor gestures, nor injuries to property, nor breaches of contract amount to provocation, except perhaps words expressing an intention to inflict actual bodily injury, accompanied by some act which shows that such injury is intended; but words used at the time of an assault—slight in itself—may be taken into account in estimating the degree of provocation given by a blow. (g) The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

“Provocation does not extenuate the guilt of homicide unless the person provoked is, at the time when he does the act, deprived of the power of self control by the provocation which he has received; and, in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.

“Provocation to a person by an actual assault, or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for

his defense. But it is uncertain how far this principle extends." Stephen, Dig. art. 224, 225, 226.

· § 476. **Texas Code Provisions on the Subject of Homicide.**—"Homicide is permitted in the necessary defense of person or property under the circumstances and subject to the rules herein set forth." Texas Penal Code, art. 567; Paschal, Dig. art. 2225.

"Homicide is permitted by law, and subject to no punishment, when inflicted for the purpose of preventing the offenses of murder, rape, robbery, maiming, arson, burglary, and theft at night, whether the homicide be permitted by the person about to be injured, or by some person in his behalf, when the killing takes place under the following circumstances:

"1. It must reasonably appear by the acts, or by the words coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named. 2. The killing must take place while the person killed was in the act of committing the offense, or after some act done by him, showing evidently an intent to commit such offense. 3. It must take place before the offense committed by the party killed is actually completed, except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except also in the cases hereinafter enumerated. 4. Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is complete so long as the offender is still inflicting violence, though the mortal wound may have been given. 5. If homicide takes place in preventing a robbery, it shall be justifiable, if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him. 6. In case of maiming, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense of maiming. 7. In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before the destruction of the same. 8. In case of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft is committed, or is within gunshot from such place or building." Texas Penal Code, art. 568; Paschal, Dig. art. 2226.

"When the homicide takes place to prevent murder or maiming,

if the weapons or means used by the party attempting or committing such murder or maiming, are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury." Texas Penal Code, art. 569; Paschal, Dig. art. 2227.

"Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and in such cases, all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack besides those mentioned in the preceding article, and any person interfering in such case, in behalf of the person about to be injured, is not justifiable in killing the aggressor, unless the life or person of the injured party is in peril, by reason of such attack upon his property." Texas Penal Code, art. 570; Paschal, Dig. art. 2228.

"The party whose person or property is so unlawfully attacked, is not bound to retreat in order to avoid the necessity of killing his assailant." Texas Penal Code, art. 571; Paschal, Dig. art. 2229.

"The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury." Texas Penal Code, art. 572; Paschal, Dig. art. 2230.

"When under article 570 a homicide is committed in the protection of property, it must be done under the following circumstances:

"1. The possession must be of corporeal property, and not of a mere right; and the possession must be actual, and not merely constructive. 2. The possession must be legal, though the right of property may not be in the possessor. 3. If the possession be once lost it is not lawful to regain it by such means as result in homicide. 4. Every other effort in his power must be made by the possessor, to repel the aggression, before he will be justified in killing." Texas Penal Code, art. 573; Paschal, Dig. art. 2231.

"Simple assault and battery or mere trespass upon property, will not justify homicide, nor will any offense, not accompanied by force, such as theft, except in the night time, and from some house or place, such as defined in articles 680 and 681." Texas Penal Code, art. 574; Paschal, Dig. art. 2232.

The statutory provisions above expressed are in effect generally adopted in this country. The phraseology of the Texas statutes is more didactic and concise than many others and has for this reason been selected for illustration.

§ 477. **When Causing Death does not Amount to Homicide.**—Under the English rule, “a person is not deemed to have committed homicide, although his conduct may have caused death, in the following cases: (a) When the death takes place more than a year and a day after the injury is inflicted is to be counted as the first day. (b) [It is said] When the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused, not by any one bodily injury, but by repeating acts affecting the body which collectively cause death, though no one of them by itself would have caused death. (c) [It seems] When death is caused by false testimony given in a court of justice.” Stephen, Dig. art. 221.

§ 478. **A Celebrated Case Examined.**—The case of *Com. v. Selfridge* (Horrigan & T. Cases on Self-Defense, 1) decided by the supreme judicial court of Massachusetts in 1806, is one of the celebrated cases in American criminal law. It established certain rules of action and principles of evidence, that many years after inspired distinctive legislation in the criminal codes of New York, Kansas, Missouri, Minnesota, Wisconsin and other states, that must ever be regarded as both wise and salutary. Mr. Wharton, whose primacy upon matters pertaining to criminal law, we all cordially recognize—has fallen into an unaccountable error in his extended criticism of this case. (*Vide* 1 Whart. Crim. Law, (5th ed.) note appended to § 1026.) Aside from the dogmatic assertion of his language, which is a disfigurement to any text, and especially unfortunate to the semi-judicial treatment of a serious topic concerning the life of fellow citizens; and his offenses in this direction become positively inexplicable, when he embarks in a very decided attempt to impugn the character of one of the most stainless jurists, who has ever graced the bench in this or any other land.

Returning to the case of *Com. v. Selfridge, supra*, we may say, that the positions it established are these: First. A man, who in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assail-

ant, provided he uses all the means in his power, otherwise, to save his own life, or prevent the intended harm—such as retreating as far as he can, or disabling his adversary, without killing him if it be in his power. Second. When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all. Third. When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterward appear that no felony was intended.

Of these three propositions the last one is the only one that will be contested anywhere, and this will not be doubted by any one, who is conversant with the principles of the criminal law. Indeed, if this last proposition be not true, the preceding ones, however true and universally admitted, would, in most cases, be entirely efficacious.

There are two kinds of self-defense: the one which is justifiable, and perfectly innocent and excusable; the other, which is in some measure blamable, and barely excusable. All the writers agree, says Sir Michael Foster, that there are cases in which a man may, without retreating, oppose force to force, even to the death. They all agree, also, that there are cases, in which the defendant cannot avail himself of the plea of self-defense, without showing that he retreated as far as he could with safety, and, then, merely for the preservation of his own life, killed the assailant. A homicide committed under these circumstances is excusable, notwithstanding there may have been some fault in the defendant. In the case of justifiable self-defense, the injured party may repel force by force in defense of his person, habitation, or property, against one who manifestly intendeth and endeavors by violence or surprise, to commit a known felony upon either. It is justly considered that the right in such case, is founded in the law of nature, and is not, nor can be, superseded by any law of society. There being at the time no protection from society, the individual is remitted for protection to the law of nature.

When a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force for force; and even his servant then attendant upon him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be justified.

§ 479. **Intent to Kill is the Essence of the Crime.**—Many cases have been decided, in all of which has been held that the intention to kill is the essence of the offense, therefore, if any intention to kill exists, it is willful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time, necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in evidence. *Weston v. Com.* 111 Pa. 251.

The decisions hold clearly enough, that no particular time need elapse between the formation of the intent to kill, and the act of killing, but none hold that there need be no time, or that there could be murder in the first degree where there was no intent, except such as was practically concurrent with the act. Premeditation and deliberation necessarily involve the idea of time. *State v. Hockett*, 70 Iowa, 442. The barbarous manner in which a homicide was committed does not of itself furnish any basis for the defense of insanity. *United States v. Lee*, 2 Cent. Rep. 692, 4 Mackey, 489.

The killing of a human being with an instrument likely to produce death, is a stupendous fact as a guide to intention. *Weeks v. State*, 79 Ga. 36.

The law requires all persons to be exceedingly cautious and careful in the use and handling of fire-arms, and one who purposely draws upon another a gun or pistol does an unlawful act, and is guilty of felonious homicide if death results from the act, unless, indeed, the act of pointing the weapon is justifiable or excusable upon some legal ground. *Lange v. State*, 95 Ind. 114.

If a man has a beast which is used to do mischief, and he, knowing this, purposely turns it loose, though barely to frighten people, and make what is called sport, and death ensues, it is as much murder as if he had incited a bear or a dog to worry the party; and if, knowing its propensity, he suffers it to go abroad, and it kills a man, even this is manslaughter in the owner. 4 Bl. Com. 197; Palmer, 545; 1 Hale, P. C. 431.

“In proving murder by poison, the evidence of medical men is

frequently required, and in applying that evidence to the facts of the case, it is not unusual for difficulties to occur. Upon this subject the following observations are well deserving attention. In general it may be taken that where the testimonials of professional men are affirmative, they may be safely credited; but where negative, they do not appear, to amount to a disproof of a charge otherwise established by strong, various, and independent evidence." 2 Roscoe, Crim. Ev. 948.

§ 480. **How Death may be Accomplished.**—The killing may be by any of the thousand forms of death by which life may be overcome. 4 Bl. Com. 196. But there must be a corporal injury inflicted; and therefore, if a man, by working upon the fancy of another, or by any unkind usage, puts another into such a passion of grief or fear, as that he either dies suddenly or contracts some disease, in consequence of which he dies, that is no felony, because no external act of violence was offered of which the law can take notice. 1 Hale, P. C. 429. Seven modes of killing are enumerated by Lord Hale. 1. By exposing a sick or weak person to the cold. 2. By laying an impotent person abroad so that he may be exposed to and receive mortal harm. 3. By imprisoning a man so strictly that he dies. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noxious and noisome filth at a man's door to poison him. 1 Hale, P. C. 431.

§ 481. **Burden of Proving Mitigating Circumstances.**—Upon the defendant is cast the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof of the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. *People v. Boling*, 83 Cal. 380; *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630; *Pond v. People*, 8 Mich. 150; *State v. Christian*, 66 Mo. 138; *Nichols v. Com.* 11 Bush, 575.

§ 482. **Evidence of Character in Cases of.**—"As a general rule in cases of homicide, evidence of the bad character of the deceased for turbulence and violence is not admissible, unless it tends to qualify, or explain the conduct of the deceased, or to

illustrate the motive or intent of the accused in committing the homicide—when it may be said to constitute a part of the *res gestæ*. The character of the deceased, however rash and blood-thirsty, furnishes, *per se*, no excuse for taking his life. To render such evidence competent and relevant, the conduct of the deceased must be of such nature, that its tendency, under the circumstances and as illustrated by his character, is calculated to create a reasonable apprehension of great bodily harm. The purpose of such evidence is to show the honesty of the accused's belief of imminent peril. *Franklin v. State*, 29 Ala. 14; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Storey v. State*, 71 Ala. 329; *DeArman v. State*, 71 Ala. 357. Where the deceased, at the time the fatal blow was struck, was making no demonstration of violence against the defendant, spoke no words, and did no act, which could tend, even remotely, to produce in the mind of the defendant any apprehension of harm. His character for turbulence and violence is not admissible." *Clopton, J.*, in *Lang v. State*, 84 Ala. 1. See *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941.

§ 483. **Evidence of Death by Poisoning.**—"It would be most unreasonable and lead to the grossest injustice, and, in some circumstances, to impunity of the worst of crimes to require, as an imperative rule of law, that the crime of poisoning shall be proved by any special and exclusive medium of proof, when that kind of proof is unattainable, and especially if it has been rendered so by the act of the offender himself. No invariable and universal rule, therefore, can be laid down, and every case must depend upon its own particular circumstances; and, as in all other cases, the *corpus delicti* must be proved by the best evidence which is capable of being adduced." *Wills*, Circ. Ev. 233.

In cases of this kind the purchase or possession of poison under false pretenses and a knowledge of its properties are deemed among the most, if not the most material circumstances. 1 Archb. Crim. Pr. & Pl. (8th ed.) 856; 3 Whart. Am. Crim. L. (7th ed.) § 3494 *a*.

Motive, however strong, does not prove the crime. Its office is to aid in the application of other circumstances that point toward guilt. It is said to be a minor or an auxiliary fact, from which, when established in connection with other necessary facts, the main or primary fact of guilt may be inferred. *Pierson v. Peo-*

ple, 18 Hun, 253. When the case depends upon circumstantial evidence, and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime; and where the motive appears, the probabilities created by the other evidence are much strengthened. Earle, *J.*, in *Pierscn v. People*, 79 N. Y. 436, 35 Am. Rep. 524.

§ 484. **Evidence of Blood Stains in Cases of Homicide.**—Stains of blood found upon the person or clothing of the party accused, have always been recognized among the ordinary *indicia* of homicide. The practice of identifying them by circumstantial evidence, and by the inspection of witnesses and jurors, has the sanction of immemorial usage in all criminal tribunals. Proof of the character and appearance of the stains by those who saw them has always been regarded by the courts as primary and legitimate evidence. It is in its nature original proof, and in no sense secondary in its character. The degree of force to which it is entitled may depend upon a variety of circumstances, to be considered and weighed by the jury in each particular case; but its competency is too well settled to be questioned in a court of law. Science has added new sources of primary evidence, but it has not displaced those which previously existed. The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal. Each party is at liberty to offer such proof as he can, and if it be admissible in its nature and relevant to the issue, it cannot be rejected on the ground that, by greater diligence, it might have been made more satisfactory and conclusive. Either party has the right to resort to microscopic or chemical tests, but neither is bound to do it, and neither can complain of the other for the omission. Porter, *J.*, in *People v. Gonzales*, 35 N. Y. 61.

Dr. Wharton with rare felicity touches the very pith and marrow of this entire subject in section 777 of his Criminal Evidence.

“Scarcely a case arises where this issue is material in which experts have not appeared ready to identify dried blood as human, and by this process to supply a link on which a conviction of a capital offense may be made to rest. It is perhaps a minor matter that in this way enormous expenses are heaped not only on the

state, but on the accused. Experts are brought from a distance by the state at great cost, protracted experiments are made by them afterwards to be detailed to the jury; and testimony is adduced which the defendant must meet at the peril of his life. Controvert it he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it is often either unwilling or unable to do. This amounts to a perversion of justice; but this is not the chief objection. Supposing experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion or on the authority of particular experts? It would seem, in view of these dangers, and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise juries, in all cases in which it is proposed to rest a conviction on the identification of certain blood-stains as human, that as matter of fact no such identification can be made out beyond reasonable doubt. That stains look like blood may be proved by expert and non-expert; that they are dried human blood can be satisfactorily proved by no one."

In a highly instructive discussion of this subject by Mr. Rogers in his well known work on *Expert Testimony*, p. 141, I find the following:

"When blood is dried on clothing, and it is necessary to extract the corpuscles by means of a liquid of a different nature from the serum, we cannot rely on slight fractional differences, since we cannot be sure that the corpuscles, after having once dried, will ever acquire, in a foreign liquid, the exact size which they had in serum. Medical evidence must, therefore, be based, in such cases, on mere speculation. . . .

"There are no certain methods of distinguishing microscopically, or chemically, the blood of a human being from that of an animal, when it has once been dried on an article of clothing." Citing *Satterthwaite's Manual of Histology*, p. 36.

Common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts, upon which the witness is called to express his opinion, are such as men in general are capable of comprehending and understanding. Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact, is to be decided by the judge presiding at the trial, and his finding is not open to revision in this court, unless, upon a report of all the evidence, it is shown to be without foundation, or is based on some erroneous application of legal principles. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

On the trial of an indictment for murder, a witness familiar with blood, who had examined, with a lens, a blood-stain on a coat, when it was fresh, and who testified to its appearance at the time he examined it, and that it was not in the same condition at the trial, was permitted to testify that its appearance when he examined it indicated the direction from which it came, and that it came from below upward, although he had never experimented with blood or other fluid in this respect. *Com. v. Sturtivant, supra*.

The views of the Wisconsin supreme court on one branch of its subject must be regarded as substantially embodying the juridical sentiment of this country. In a recent case decided in that court (*Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704) a physician had testified as an expert in regard to an examination made by him with a microscope of certain blood stains found upon pieces of cloth and wood. He gave it as his opinion, founded upon such examination, that some of the stains were caused by human blood corpuscles. For the purpose of discrediting the witness it was proposed on the part of the defense to read opinions stated in certain medical works on this subject. The court would not permit this to be done, holding, in effect, that as Dr. Piper had not referred to any medical work, and did not rely upon the authority of medical writers to support his views, but testified from his own knowledge and experience, it was not proper to read from medical works to contradict him. There can be no doubt of the correctness of this decision, which is sustained by the authorities

referred to by *Mr. Justice Cassoday* in *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60.

Where a medical witness has testified as from his own knowledge and experience to a matter which is within his province as an expert (as that blood stains were caused by human blood corpuscles) he cannot be impeached by reading to the jury extracts from medical works. *Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704.

Proof of finding, six months after the alleged murder, blood on timbers and boards of the barn, where according to the testimony the body had been, was held competent as tending to corroborate. So far as the lapse of time detracted from the force of evidence, it is for the consideration of the jury. After evidence had been given tending to identify certain boards as those taken from the prisoner's sleigh, and that spots, caused by the flow of blood from the dead body, had been on them since the night of the alleged removal, there being no evidence that they had been tampered with since that time or were in any different condition, save that hogs had been dressed upon them, evidence of an expert was received as to certain experiments determining that the spots upon the board were some of them human and some hog's blood. Held, no error, and that the facts that the boards had been a long time out of the possession of the prisoner and had been used by other people, while they affected the question as to the identity of the boards and of the blood spots, did not render such evidence inadmissible. *Lindsay v. People*, 63 N. Y. 143.

Elaborate treatment of this subject is found in a discriminating article by Hon. Clark Bell, reprinted in the September (1892) number of the *Medico Legal Journal*, under the title of "Blood and Blood Stains in Medical Jurisprudence."

§ 485. Evidence should Convince Jury Beyond Reasonable Doubt.—In cases of homicide before the defendant can be convicted—this being a crime involving a capital punishment—the jurors should be satisfied upon the evidence disclosed, that the accused is guilty; and their belief in his guilt should be beyond a reasonable doubt. *Lang v. State*, 84 Ala. 1; *Gunter v. State*, 83 Ala. 96; *Hudspeth v. State*, 50 Ark. 534; *People v. Goslaw*, 73 Cal. 323; *Territory v. Bannigan*, 1 Dak. 432; *Bond v. State*, 21 Fla. 738; *Weeks v. State*, 79 Ga. 36; *Marshall v. State*, 74 Ga. 26; *Watt v. People*, 1 L. R. A. 403, 126 Ill. 9; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *State v. Trout*, 74 Iowa, 545;

Craft v. State, 3 Kan. 450; *Payne v. Com.* 1 Met. (Ky.) 370; *Com. v. Robinson*, 146 Mass. 571; *State v. George*, 62 Iowa, 682; *State v. Johnson*, 37 Minn. 493; *McKenna v. State*, 61 Miss. 589; *Swigar v. People*, 109 Ill. 272; *State v. Walker*, 98 Mo. 93; *State v. Anderson*, 86 Mo. 309; *Territory v. Clayton*, 8 Mont. 1; *Casey v. State*, 20 Neb. 138; *State v. McCluer*, 5 Nev. 132; *People v. Reich*, 110 N. Y. 660; *People v. Willson*, 109 N. Y. 345; *Stephens v. People*, 4 Park. Crim. Rep. 396; *State v. Brewer*, 98 N. C. 607; *State v. Harrison*, 50 N. C. 115; *State v. Anderson*, 10 Or. 448; *Tiffany v. Com.* 121 Pa. 165; *McLain v. Com.* 99 Pa. 86; *Henry v. State*, 11 Humph. 224; *Poe v. State*, 10 Lea, 673; *Alexander v. State*, 25 Tex. App. 260; *Heard v. State*, 24 Tex. App. 103; *Williams v. State*, 15 Tex. App. 401; *Kemp v. State*, 11 Tex. App. 174; *Russell v. Com.* 78 Va. 400; *Dean v. Com.* 32 Gratt. 912; *Timmerman v. Territory*, 3 Wash. Terr. 445; *Territory v. Manton*, 8 Mont. 95; *Gomez v. State*, 15 Tex. App. 327; *Scott v. State*, 23 Tex. App. 452; *Massengale v. State*, 24 Tex. App. 181; *Meyers v. Com.* 83 Pa. 131; *People v. Lyons*, 110 N. Y. 618; *Kendrick v. State*, 55 Miss. 436; *State v. Clouser*, 69 Iowa, 313; *Davis v. State*, 74 Ga. 869; *Overman v. State*, 49 Ark. 364; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *State v. Porter*, 34 Iowa, 131; *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com. v. Drum*, 58 Pa. 9; *Warren v. Com.* 37 Pa. 45; *Kilpatrick v. Com.* 31 Pa. 198; *State v. Jones*, 97 N. C. 469; *People v. Cignarale*, 110 N. Y. 23.

§ 486. **Note on Expert Medical Evidence.**—Apropos of this discussion I will refer to an article published in Vol. 6, p. 126, of the Columbia Law Times, the intent of which is to emphasize the uncertainty and distrust that so frequently attends the testimony of experts especially in capital cases. The article refers particularly to the comments of Lord Campbell in *The Tracey Peerage*, 10 Clark & F. 154, to the equally incisive criticisms of *Justices* Earl and Grey of the New York court of appeals in *Ferguson v. Hubbell*, 97 N. Y. 507, and *People v. Kemler*, 119 N. Y. 580, respectively, and in the concluding paragraphs quotes Dr. Wharton's familiar phillipic against the whole fraternity of Medical Experts. Whart. Crim. Ev. § 420. In many ways it will be found instructive as indicating the extreme caution that should accompany the consideration of such evidence.

CHAPTER LV.

FORGERY.

- § 487. *Forgery Defined.*
- 488. *What Constitutes an Intent to Defraud.*
- 489. *What is Making a False Document.*
- 490. *What Constitutes Uttering.*
- 491. *What Evidence is Pertinent.*
- 492. *Declarations must be Considered in their Entirety.*
- 493. *Burden of Proof is upon Prosecution.*
- 494. *Other Forgeries may be Shown.*
- 495. *What State must Show in Case of Bill, Note, Check, etc.*
- 496. *Evidence of Handwriting.*
- 497. *Direct Evidence Seldom Required.*
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§ 487. **Forgery Defined.**—Forgery is defined to be the signing by one without authority, and falsely, and with intent to defraud, the name of another to an instrument, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. *State v. Thompson*, 19 Iowa, 299; *Waterman v. State*, 67 Ill. 91.

In *Com. v. Costello*, 120 Mass. 367, where the defendant was charged with forging a bond to be used for the purpose of dissolving an attachment, the court held that an instrument falsely made with intent to defraud is a forgery, although if it had been genuine, other steps must have been taken before the instrument would have been perfected, and those steps were not taken. It was contended that the bond was worthless upon its face, as it was not approved, and until approved, could not serve to dissolve the attachment. The court said: "It is true that the false making of an instrument merely frivolous, or one which upon its face is clearly void, is not forgery, because from its character it could not have operated to defraud, or been intended for that purpose; but if the instrument is one made with intent to defraud although before it can have effect other steps must be taken, or other proceedings had upon the basis of it, then the false making is a forgery, notwithstanding such steps may never have been taken or

proceedings had." In *Ex parte Finley*, 66 Cal. 264; the defendant was convicted of forging a decree of divorce, and it was held that the information was sufficient, without averring a marriage of the parties to the forged decree, as "on its face the writing shows that it may have been used to consummate a fraud."

An instrument in writing of which forgery can be predicated is one which, if genuine, would operate as the foundation of another person's liability (*Com. v. Ray*, 69 Mass. 446; 3 Greenl. Ev. § 103; *Reg. v. Boulton*, 2 Car. & K. 604; *Reed v. State*, 28 Ind. 396; *Garmire v. State*, 2 West. Rep. 284, 104 Ind. 444; 2 Bishop, Crim. L. § 536; *State v. Cook*, 52 Ind. 574; *Abbott v. State*, 59 Ind. 70) though the contract need not be perfectly set out, but it must be in the instrument and arise from and be imported by the terms used. *Garmire v. State*, and *Com. v. Ray*, *supra*.

The phrase "instrument in writing" or "instrument of writing," means a legal writing or written agreement embodying a promise, a contract, or obligation. 1 Bouvier, Law Dict. 728; 1 Rapalje & L. Law Dict. 666; *Rex v. Moore*, 2 Car. & P. 236; *Smith v. Adkins*, L. R. 14 Eq. 402; *State v. Fenly*, 18 Mo. 445.

When a note or instrument is spoken of as "forged," it is understood to be a counterfeit one, and this understanding is in conformity with the definitions given to the two words by our best lexicographers. Webster's Dictionary, Worcester's Dictionary, Imperial Dictionary, etc. Whenever, therefore, the expression "forged note," or "counterfeit note," is used, we understand the speaker to refer to an instrument by which some one has undertaken to utter and pass, as the genuine and personal act of another, something which he has himself prepared in the similitude and likeness of the other's act, and by such similitude and likeness, which he has endeavored to impress upon the spurious instrument, to deceive and defraud. In other words, forgery is the attempted imitation of another's personal act, and by the means of such imitation to cheat and defraud; and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims and insists by and in the act itself, that he is authorized to obligate the individual, whom he is assuming to obligate precisely as he undertakes to do. 2 Russell, Crimes (9th Am. ed.), 946, 947; *Reg. v. White*, 1 Den. C. C. 208, 2 Cox, C. C. 210, 2 Car. & K. 404; *Rex v. Story*, Russ. & R. 81; *Rex v. Arscott*,

6 Car. & P. 408; 2 Bishop, Crim. L. (7th ed.) § 582; 2 Whart. Crim. L. (7th ed.) § 1432; 2 Archb. Crim. Pr. & Pl. (7th ed.) 819; 2 Archb. Crim. Pr. & Pl. (Pomeroy's ed.) 1584; *Conner's Case*, 3 City Hall Rec. 59; *Re Heilbonn*, 1 Park. Crim. Rep. 429; *Com. v. Baldwin*, 11 Gray, 197, 71 Am. Dec. 703; *State v. Young*, 46 N. H. 266, 88 Am. Dec. 212.

§ 488. **What Constitutes an Intent to Defraud.**—"An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact; nor by the fact that he had, or thought he had, a right to the thing to be obtained by the false document.

"The presumption may be rebutted by proof that at the time when the false document was made there was no person who could be reasonably supposed by the offender to be capable of being defrauded thereby; but it is not necessarily rebutted by proof that there was no person who could in fact be defrauded thereby.

"It is uncertain whether, in the absence of any evidence as to the existence of any person who can be defrauded by a false document, an intent to defraud will or will not be presumed from the mere making of the document.

"An intent to deceive the public or particular persons, but not to commit a particular fraud or specific wrong upon any particular person, is not an intent to defraud, within the meaning of this article." Stephen, Dig. Crim. L. art. 355.

Proof of participation in the forgery of a promissory note, and in the use of it as genuine, is of itself proof of the guilty intent.

Proof of like acts is allowed in some cases to show a criminal intent in the case of an act which might be an innocent one; but evidence of participation in forging a note, and using it as genuine, is of itself proof of guilty intent. Hence the reason of the rule fails in that case. *People v. White*, 62 Hun, 114.

§ 489. **What is Making a False Document.**—"To make a false document is

"(a) to make a document purporting to be what in fact it is not;

"(b) to alter a document, without authority, in such a manner

that if the alteration had been authorized it would have altered the effect of the document;

“(c) to introduce into a document, without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document;

“(d) to sign a document;

“(i.) in the name of any person without his authority, whether such name is or is not the same as that of the person signing;

“(ii.) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;

“(iii.) in a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person;

“(iv.) in a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

“But it is not making a false document

“(a) to procure the execution of a document by fraud;

“(b) to omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, unless the matter omitted qualifies the matter inserted;

“(c) to sign a document in the name of a person personated by the person who signs it, provided that the effect of the instrument does not depend upon his identity with that person.

“(d) It is not essential to the making of a false document that the false document should be so framed that, if genuine, it would have been valid or binding, provided that, in cases in which the forgery of any particular instrument is made a specific offense by any statute, the false document must, in order that the offense may be completed, fall within the description given in the Act.

“(e) The fact that a document is made to resemble that which it purports to be, and is not, is evidence, for the consideration of the jury, of an intent to defraud, but is not essential to the making of a false document.

“Provided that, in cases in which the forgery of any particular instrument is made a specific offense by any statute, the false document must have such a resemblance to the document which

it is intended to resemble as to be likely to deceive a common person." Stephen, Dig. Crim. Law, arts. 356.

§ 490. **What Constitutes Uttering.**—In *People v. Caton*, 25 Mich. 392, Judge Cooley says: "To constitute an uttering, it is not necessary that the forged instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. To utter a thing is to offer it, whether it be taken or not."

Putting a forged deed on record, or averring it in pleading as a genuine deed, is uttering and publishing it, within the meaning of the statute. *Paige v. People*, 3 Abb. App. Dec. 439, 6 Park. Crim. Rep. 683.

The word "uttering" would seem to be more accurately defined by the word "negotiating," which means, in its popular sense, an intercourse of business, trafficking or treating, accordingly, not only a sale or paying away a counterfeit note or indorsement, but obtaining credit on it in any form, as by leaving it in pledge, or indeed, offering it in dealing, though it be refused, will amount to an uttering and publishing. The delivery of a counterfeit note to an innocent person for the purpose of having it passed away, is *per se* an uttering by the prisoner, although in another case, the uttering seems not considered complete till the innocent party has actually tendered the note in payment. This rule is based upon the doctrine that where an innocent person is employed for a criminal purpose, the employer must be answerable. Uttering implies two parties, a party acting, and a party acted upon. If, by the way of sale, there must be a vendee; if, by pledge, there must be a pledgee; if, by offer, there must be one present to hear the offer, and if, simply by declaring its goodness, there must be some one addressed as a reader or hearer. The crime of uttering and publishing, is therefore not complete until the paper is transferred, and comes to the hands or possession of some person other than the felon, his agent or servant. *People v. Rathbun*, 21 Wend. 509.

To utter and publish an instrument, is to declare or assert directly or indirectly, by words or actions, that it is good. 2 Archb. Crim. Pr. & Pl. 846, *note*.

The crime of forgery is one felony. That may be complete without any uttering and even without publication. 2 Russell, Crimes (Am. ed. 1836) 295, and cases cited. Uttering is another

and distinct felony. Even delivery to a guilty agent, for the purpose of uttering, thus absolutely and irrevocably parting with the paper, and though the agent complete the uttering, leaves the employer but an accessory. The principal crime is committed by the agent. Till he has performed his office there can be neither accessory nor principal. This alone shows that the disponent must be reached. The same thing, where the agent is innocent, makes the employer a principal. The distinction lies in the doctrine of principal and accessory, a doctrine peculiar to felonies; and the distinction cannot be maintained, if a mere delivery for the purpose of negotiation is in itself an uttering. *People v. Rathbun*, 21 Wend. 534.

§ 491. **What Evidence is Pertinent.**—The English authorities tenaciously maintain that any evidence is pertinent, which tends to show an unauthorized filling in of a blank check, draft, promissory note, or like instrument of a commercial character, as under their decisions, such an unauthorized filling in of the blank paper, amounts to forgery.

In *Rex v. Hart*, 7 Car. & P. 652, the prisoner was given an acceptance, blank as to amount, with authority to fill it in for £200. He filled it in for £500. This was held to be forgery, and upon the point being reserved the conviction was sustained by all the English judges. In *Reg. v. Bateman*, 1 Cox, C. C. 186, it was said that where a check is given with a certain limited authority, the agent is confined strictly within the limits of that authority, and that if he fills in the check with a different amount from that authorized, or if, after the authority is at an end, he fills it with any amount whatever, it is clearly forgery. The doctrine of *Rex v. Hart*, was followed in *Reg. v. Wilson*, 2 Car. & K. 527. There the prisoner was authorized to fill in the amount due on a bill for £150 and interest, then to get the check cashed and pay the bill. Instead of doing this, he filled in £250 and retained part of the proceeds, claiming that it was due him for salary. This was held to be forgery. Where the authority is general, a different rule prevails. Thus, in *Reg. v. Richardson*, 2 Fost. & F. 343, the clerk had authority to draw checks upon his employer's bank, not only to the order of the creditors of the firm, but to his own order, for such sums as he deemed necessary to pay the cash disbursements of the business. Upon one occasion he drew a check to his own order for £11, 10s, the proceeds of which he appropriated.

He was acquitted of forgery and put on trial for embezzlement, and the court held that the prisoner "could not be convicted of forgery, inasmuch as having a general authority to draw, he did not necessarily exceed his authority when he drew the check; and that the criminal act, if any, was the subsequent appropriation of it." In that case, however, the distinction is observed, in the statement of facts, that the clerk was not bound always to draw the checks in favor of a particular creditor, but had authority to draw generally and pay the creditor with cash.

The principle of the English cases seems to have been generally followed in this country. Whart. Am. Crim. L. (8th ed.) §§ 671, 672; *People v. Graham*, 6 Park. Crim. Rep. 135; *Wilson v. South Park Comrs.* 70 Ill. 46; *State v. Maxwell*, 47 Iowa, 454; *Biles v. Com.* 32 Pa. 529, 75 Am. Dec. 568; *State v. Kroeyer*, 47 Mo. 552; *State v. Flanders*, 38 N. H. 324. The only cases where a doubt is expressed as to the rule are *Putnam v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, and *Van Duzer v. Howe*, 21 N. Y. 531. These, however, were civil actions upon paper which were fraudulently used, or in which the blank amount was fraudulently increased beyond the sum authorized. They were properly decided upon the estoppel principle, and the doubts which were expressed upon the point in question proceeded upon the mistaken idea that, if the paper was forged in the sense of the criminal law, it would be illogical, in a civil action, to hold the persons who signed it. But there is nothing incongruous between a definition of forgery, upon which the guilty agent may be punished criminally, and a civil rule that, notwithstanding the forgery, one who signed the paper in blank, intrusted it to such guilty agent and conferred upon the latter the power of defrauding the innocent, shall suffer rather than the victim. *People v. Dickie*, 62 Hun, 400.

§ 492. Declarations must be Considered in their Entirety.

—If the prosecution lies on the confession alone, the prisoner is entitled to the full effect of that portion of the confession which goes in his favor; but if there is other evidence upon which the prosecution can with justice insist upon a conviction, the jury may, if they think proper, convict, notwithstanding the confession alone would be sufficient. In other words, if the prosecution uses the declaration of the prisoner, the whole of it must be taken together. One part cannot be selected, and the other left; and if there be no other evidence incompatible with it, the entire

declaration of the prisoner must be taken as true. But if, after the whole of the statement of the prisoner is in evidence, the prosecution is in a situation to contradict any part of it, it is at liberty to do so, and then the statement of the prisoner is in evidence, the prosecution is in a situation to contradict any part of it, it is at liberty to do so, and then the statement of the prisoner, and all the other evidence, must be left to the jury for their consideration, precisely as in any other case, when one part of the evidence is contradictory to another. *Roscoe, Crim. Ev.* 55.

§ 493. **Burden of Proof is upon Prosecution.**—In all criminal cases the burden is upon the prosecution to produce such evidence as will satisfy the jury that the charge against the accused is true,—such evidence that, when the jury has considered it, and all the rest of the evidence, there will remain no doubt (for which a sensible reason can be given) that the accused is guilty. After fairly considering the evidence, if there remains a reasonable doubt upon the evidence, or because of the want of evidence about the guilt of the accused, he is entitled to his acquittal. If, on the other hand, the evidence is of that character that a conscientious and sensible man may be satisfied that the prisoner is guilty, it is the duty of the jury to find him guilty. *United States v. Long*, 30 Fed. Rep. 678.

§ 494. **Other Forgeries may be Shown.**—For the purpose of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. *Mayer v. People*, 80 N. Y. 364; *People v. Shulman*, 80 N. Y. 373, *note*. "Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose. Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the people are not bound to rest upon a *prima facie* case, but have the right to confirm that evidence by the proof as to the uttering of other forged checks." *People v. Everhardt*, 104 N. Y. 591.

It is quite obvious that a person may have in his possession one forged piece of paper without being necessarily chargeable with information as to its character, but if possession of several other pieces of forged paper can be shown, the presumption of innocence diminishes. Hence other forgeries can be shown, as well as the

possession of other forged documents. *Lindsey v. State*, 38 Ohio St. 507; *State v. McAllister*, 94 Me. 139; *Francis v. State*, 7 Tex. App. 501; *Smith v. State*, 29 Fla. 408; *Carver v. People*, 39 Mich. 786; *Com. v. Russell*, 156 Mass. 196; *State v. Fisher*, 65 Mo. 437; *People v. Farrell*, 30 Cal. 316; Taylor, Ev. § 322.

Evidence may be given upon an indictment for passing counterfeit money to establish the passing of other bills of a similar character, for the purpose of showing the intent of the defendant in reference to the passing of the bill for which he is upon trial. So, also, where guilty knowledge is an ingredient of the offense, evidence may be given of the commission of other acts of a like character where they are necessarily connected with that which is the subject of the prosecution, either by some connection of time or place, or as furnishing a clue to the motive on the part of the accused, as in the case of receiving stolen goods, knowing them to be such. *Coleman v. People*, 58 N. Y. 555.

§ 495. **What State must Show in Case of Bill, Note, Check, etc.**—Where a bill, note, check, etc., is the subject of a forgery it must be shown by the prosecution that the instrument was not signed by the person by whom it purports to be signed or that such person did not exist at the time, or in other words is a fictitious person. And it further appears that the law will refuse to recognize a man's intentions as a crime, however corrupt and criminal those intentions may be. His intentions simply form the light by which we read and weigh his acts. *People v. Elliott*, 90 Cal. 586.

§ 496. **Evidence of Handwriting.**—Before a writing can be used as a standard of comparison of writing it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and this question of its admissibility is to be determined by the judge presiding at the trial. So far as his decision is of a question of fact merely, it is final, if there is proper evidence to support it; and exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *Com. v. Coe*, 115 Mass. 481.

The same question has very recently been before the court in Vermont in the case of *Rowell v. Fuller*, 5 New Eng. Rep. 217, 59 Vt. 688, where the court, reviewing the decisions there, says

that the question has not before been authoritatively decided in that state, and lays down this rule: That when a writing is disputed, and another is offered in proof as a standard, the court should first find, as a fact, that the latter is genuine, and then submit it to the jury in comparison with that in controversy.

The doctrine as enunciated in *Com. v. Coe*, 115 Mass. 481, which is the same as that so recently settled in Vermont, has since been reaffirmed in *Costello v. Crowell*, 133 Mass. 352, and again in *Costelo v. Crowell*, 139 Mass. 590.

The rule in England is now the same as in Massachusetts and Vermont. For centuries, however, it was otherwise, and the English courts denied the admissibility of such testimony altogether, until 1854, when Parliament, by 17 & 18 Vict. chap. 125, passed what is known as "The Common Law Procedure Act," which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise, of the writing in dispute." Under this rule, when any writing is proved to be genuine to the satisfaction of the presiding judge, it shall be admitted as a standard of comparison. By the English rule, under this statute, the jury need not consider or inquire into the genuineness of the writing introduced for the purpose of comparison, as the statute obviates the necessity of any such inquiry, and makes the finding of the judge conclusive on that point. In the light of the authorities, however, there are courts of high standing and for whose decisions we have great respect, which have adopted a different rule, and which hold that the jury should ultimately pass upon the question. Such is the rule in New Hampshire, where, as it is well understood, the doctrine of proof of handwriting by comparison has always clung more tenaciously to the conservative English common law rule than ever appeared satisfactory to the courts of Maine, Massachusetts, Connecticut, Vermont, and some of the other states.

A witness to handwriting cannot be asked on cross-examination his opinion as to a document not relevant to the issue, and not already received as a standard of comparison for the purpose of contradicting his answers. *Van Wyck v. McIntosh*, 14 N. Y. 439; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514, 523;

United States v. Chamberlain, 12 Blatchf. 390; *Rose v. First Nat. Bank of Springfield*, 91 Mo. 399, 60 Am. Rep. 258. Here issue being whether a check was forged, the court, over objection, permitted to be presented to the bank cashier upon cross-examination, two checks upon which were written the alleged forged name; and subsequently a witness in rebuttal testified that he had written the name at the trial. Held, reversible error, as the rule which excludes comparison with extrinsic papers and signatures, is substantially the same in direct and cross-examination. *Tyler v. Todd*, 36 Conn. 218, citing *Bacon v. Williams*, 13 Gray, 525, to the same effect. Abbott, Trial Brief, § 429.

When handwriting is to be proved by comparison, the standard used for the purpose must be the genuine and original writing, and must first be established by clear and undoubted proof. Impres-

NOTE.—While the defendants were putting in their evidence upon the trial, and for the purpose of having a larger number of Mary A. Suiter's genuine signatures in evidence for comparison with the alleged forged signatures, she produced a signature which she said she had written two years before; and the defendants' counsel offered to put it in evidence. Plaintiff's counsel objected to it as incompetent, immaterial and improper, and on the further ground that it was written with a pencil. The trial judge then remarked: "I don't think the signature of a party written on a loose scrap of paper at some time or another should be put in evidence. I will sustain that objection. It would be a dangerous rule to adopt. I will sustain the objection on that particular piece of paper." The same witness then produced two of her signatures written, one fourteen and the other twelve or thirteen years before the trial, and testified that she had written them at the times mentioned; and defendants' counsel offered to put them in evidence for the purpose of comparison. Plaintiff's counsel objected to them on the same grounds as before, and the trial judge said: "I will exclude the evidence and give you an exception. I don't think this evidence is either admissible or safe." It will be observed that these three signatures were not excluded upon the ground that they were not sufficiently proved, or that the judge was not satisfied that they were not genuine. We agree with the general term that these signatures should have been received in evidence for comparison. They would have given to the expert witnesses a wider range for comparison. As it was, the only signatures they had for comparison with the alleged forged signatures were the signatures of Mary A. Suiter to her affidavit upon the answer, and the signature of Ann Suiter to her affidavit upon her answer in this action, which was written by Mary A. Suiter. So that there was in evidence for comparison only one signature of the name of Mary A. Suiter, with which the experts could compare the alleged forged signature. We think the range of comparison was altogether too narrowly limited, and that it could not be thus arbitrarily confined. It cannot be said that the exclusion of this evidence was harmless. *Mutual L. Ins. Co. of New York v. Suiter*, 131 N. Y. 557.

sions of writings taken by means of a press, and duplicates made by a copying machine are not original, and cannot be used as standards of comparison. *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596.

The rule as to comparison of handwriting does not apply to the court or the jury, who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting. *Griffith v. Williams*, 1 Crompt. & J. 47.

But the document with which the comparison is made must be one already in evidence in the case, and not produced merely for the purpose of the comparison. Thus, where upon an indictment for sending a threatening letter, in order to prove the handwriting to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, Bolland, *B.*, after considering *Griffith v. Williams*, rejected the evidence, observing, that to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. *Morgan's Case*, 1 Mood. & R. 134.

In order to prove that the prisoner was guilty of counterfeiting it is not necessary to show that he was detected in the act, but presumptive evidence, as in other cases, will be sufficient, viz: that false coin was found in his possession, and that there were coining tools discovered in his house, etc. But the evidence must be such as to lead to a plain implication of guilt. Two women were indicted for coloring a shilling and a sixpence, and the third prisoner, a man, for counseling them, etc. It appeared that he had visited them once or twice a week; that the rattling of copper money had been heard whilst he was with them; that on one occasion he was seen counting something after he came out; that he resisted being stopped, and jumped over a wall to escape; and there was found upon him a bad three shilling piece, five bad shillings and five bad sixpences. Upon a case reserved, the judge thought this evidence too slight to support a conviction. *Isaac's Case*, cited in 1 Russ. Crimes (Greave's ed.) 61.

§ 497. **Direct Evidence Seldom Required.**—"It is seldom that direct evidence can be given of the fact of forgery. In the case of negotiable securities, the evidence is usually applied to the uttering rather than to the forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in the case of a bond or will, after proof that the instrument has been forged by someone, a strong presumption necessarily arises against the party in whose favor the forgery is made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the forged instrument is in the handwriting of the prisoner, must, if unexplained, necessarily be strong evidence of his guilt." 2 Stark. Ev. (2d ed.) 460.

§ 498. **New York Code Provisions.**—"A person is guilty of forgery in the first degree who with intent to defraud, forges,

"1. A will or codicil of real or personal property, or the attestation thereof, or a deed or other instrument, being or purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or affected; or,

"2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or purporting to have been made by a court or officer duly authorized to make such a certificate; or,

"3. A certificate, bond, paper, writing, or other public security, issued or purporting to have been issued by or under the authority of this state, or of the United States, or of any other state or territory of the United States, or of any foreign government, country or state, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority; or,

"4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest; or,

"5. A certificate of stock, bond or other writing, bank-note, bill of exchange, draft, check, certificate of deposit, or other obliga-

tion or evidence of debt, issued or purporting to be issued, by any bank, banking association or body corporate existing under the laws of this state, or of the United States, or of any other state, government or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty or obligation; or,

“6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.” N. Y. Penal Code, § 509.

“A person is guilty of forgery in the second degree who, with intent to defraud,

“1. Forges the great or private seal of this state, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this state, or of the United States, or of any other state or territory of the United States, or of any other state, government or country, or any impression of such a seal; or any gold or silver coin, whether of the United States or of any foreign state, government or country; or,

“2. Forges a record of a will, conveyance, or instrument of any kind, the record of which is by the law of this state made evidence, or of any judgment, order, or decree of any court or officer, or a certificate or authenticated copy thereof; or,

“A judgment roll, judgment, order, or decree of any court or officer, or an enrollment thereof, or a certified or authenticated copy thereof, or any document or writing purporting to be such judgment, order, decree, enrollment, or copy; or,

“An entry made in any book of record or accounts, kept by or in the office of any officer of this state, or of any village, city, town, or county of the state, by which any demand, claim, obligation, or interest, in favor of or against the people of the state, or any city, village, town or county, or any officer thereof, is or purports to be created, increased, diminished, discharged, or in any manner affected; or an entry made in any book of records or accounts kept by a corporation doing business within the state, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished, discharged. or in any manner affected; or,

"An instrument, document, or writing, being or purporting to be, a process or mandate issued by a competent court, magistrate, or officer of the state, or the return of an officer, court or tribunal, to such a process or mandate; or a bond, recognizance, undertaking, pleading, or proceeding, filed or entered in any court of the state, or a certificate, order or allowance by a competent court, or officer, or a license or authority granted pursuant to any statute of the state or a certificate, document, instrument, or writing, made evidence by any law or statute; or,

"An instrument or writing, being or purporting to be the act, of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged, or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, the punishment for forging, altering, or counterfeiting which is not hereinbefore prescribed, by which false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured in his person or property; or,

"3. Makes or engraves a plate in the form or similitude of a promissory note, bill of exchange, bank note, draft, cheque, certificate of deposit, or other evidence of debt, issued by a banker, or by any banking corporation or association, incorporated or carrying on business under the laws of the state, or of the United States, or of any other state or territory of the United States, or of any foreign government, or country, without the authority of such banker, or banking corporation or association; or,

"Without like authority, has in his possession or custody such a plate, with intent to use, or permit the same to be used, for the purpose of taking therefrom any impression to be uttered; or,

"Without like authority, has in his possession or custody any impression taken from such a plate, with intent to have the same filled up and completed for the purpose of being uttered; or,

"Makes or engraves, or causes to be made or engraved, upon any plate, any figures or words, with intent that the same may be used for the purpose of falsely altering any evidence of debt hereinbefore mentioned." N. Y. Penal Code, § 511.

"An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an

individual, a partnership, a corporation or association, or an officer thereof, is a written instrument or a writing, within the provisions of this chapter. N. Y. Penal Code, § 513.

“A person, who, with intent to defraud or conceal any larceny or misappropriation by any person or any money or property, either,

“1. Alters, erases, obliterates, or destroys an account, book of account, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership, or individual; or,

“2. Makes a false entry in any such account or book of accounts; or,

“3. Willfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction;

“Is guilty of forgery in the third degree.” N. Y. Penal Code, § 515.

CHAPTER LVI.

PERJURY.

§ 499. *Term Defined.*

500. *Two Witnesses Required to Prove.*

501. *One Witness Insufficient.*

502. *Proof Required that Defendant was on Oath..*

503. *Impeaching Evidence always Competent.*

504. *Testimony of an Accomplice Received with Suspicion.*

505. *Authorities Considered.*

§ 499. **Term Defined.**—This offense at common law is defined to be a willful false oath, by one who being lawfully required to depose the truth in any judicial proceedings, swears absolutely in a matter material to the point in question, whether he be believed or not.

If we analyze this definition we will find, 1st. That the oath must be willful. 2d. That it must be false. 3d. That the party was lawfully sworn. 4th. That the property was judicial. 5th. That the assertion was absolute. 6th. That the falsehood was material to the point in question.

The intention must be willful. The oath must be taken and falsehood asserted with deliberation, and a consciousness of the nature of the statement made; for if it has arisen in consequence of inadvertency, surprise or mistake of the import of the question, there was no corrupt motive (1 Hawk, P. C. chap. 69, § 2); but one who swears willfully and deliberately to a matter which he rashly believes, which is false, and which he had no probable cause for believing, is guilty of perjury. *Com. v. Cornish*, 6 Binn. 249. See *United States v. Shellmire*, 1 Baldw. 370; *State v. Cockran*, 1 Bail. L. 50.

The oath must be false. The party must believe that what he is swearing is fictitious; for, if intending to deceive, he asserts that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him. 3 Coke, Inst. 166; 1 Hawk, P. C. chap. 69, § 6.

The party must be lawfully sworn. The person by whom

the oath is administered must have competent authority to receive it; an oath, therefore, taken before a private person, or before an officer having no jurisdiction, will not amount to perjury. 3 Coke, Inst. 166; *Jackson v. Humphrey*, 1 Johns. 498; *Bullock v. Koon*, 9 Cow. 30; *State v. McCroskey*, 3 McCord, L. 308; *State v. Stephenson*, 4 McCord, L. 165; *Rex v. Hanks*, 3 Car. & P. 419; *State v. Alexander*, 11 N. C. 182; *State v. Hayward*, 1 Nott & McC. L. 546; *State v. Wyatt*, 3 N. C. 56; *Com. v. White*, 8 Pick. 453; 2 Russell, Crimes, 520; 2 Chitty, Crim. L. 304.

The proceedings must be judicial. Proceedings before those who are in any way entrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose. 2 Chitty, Crim. L. 303; 2 Russell, Crimes, 518; 1 Hawk, P. C. chap. 69, § 3. *Vide Respublica v. Newell*, 3 Yeates, 414; *United States v. Bailey*, 34 U. S. 9 Pet. 238, 9 L. ed. 113. Perjury cannot therefore be committed in a case of which the court had no jurisdiction. *State v. Alexander*, *State v. Wyatt*, *State v. McCroskey*, *Com. v. White* and *State v. Hayward*, *supra*.

The assertion must be absolute. If a man, however, swears that he believes that to be true which he knows to be false it will be perjury. 2 Russell, Crimes, 518; *Miller's Case*, 3 Wils. 427, 2 W. Bl. 881; *Pedley's Case*, 1 Leach, C. L. 242; *Com. v. Cornish*, 6 Binn. 249; Gilbert, Ev. (Lofft's ed.) 662.

The oath must be material to the question depending. Where the facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to a legal perjury. *Chapham v. White*, 8 Ves. Jr. 35; *Larston's Case*, 2 Rolle, 41, 42, 369; 2 Russell, Crimes, 521; 3 Coke, Inst. 167; 1 Hawk, P. C. chap. 69, § 8; Bac. Abr. title *Perjury*, a; *State v. Hathaway*, 2 Nott. & McC. L. 118. Nor can perjury be assigned upon the valuation under oath, of a jewel or other thing, the value of which consists in estimation. *Leakins v. Clissel*, Sid. 146, 1 Keb. 510.

It is not within the plan of this work to cite all the statutes passed by the general government, or the several states on the subject of perjury. It is proper, however, here to transcribe a part of the 13th section of the Act of Congress of March 3, 1825, 4 Stat. at L. 118, which provides as follows: "If any person in any case, matter,

hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person, so offending, shall be deemed guilty of perjury, and shall on conviction thereof, be punished by fine, not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offense. And if any person or persons shall knowingly or willingly procure any such perjury to be committed, every person so offending shall be deemed guilty of subornation of perjury, and shall on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offense."

10. In general it may be observed that a perjury is committed as well by making a false affirmation, as a false oath. *Vide generally*, 16 Vin. Abr. 307; Bac. Abr. *h. t.*; Com. Dig. title *Justices of Peace*, B. 102-106; 4 Bl. Com. 137, 138; 3 Coke, Inst. 163-168; 1 Hawk, P. C. chap. 69; 2 Russell, Crimes, book V. chap. 1; 2 Chitty, Crim. L. chap. 9; Roscoe, Crim. Ev. *h. t.*; Burn's J., *h. t.*; Williams' J., *h. t.*

"Perjury is an assertion upon an oath duly administered in a judicial proceeding, before a competent court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the asserter does not believe to be true when he makes it, or on which he knows himself to be ignorant. In this definition, the word "oath" includes every affirmation which any class of persons are by law permitted to make in place of an oath. The expression "duly administered" means administered in a form binding on his conscience, to a witness legally called before them, by any court, judge, justice, officer, commissioner, arbitrator, or other person who, by the law for the time being in force, or by consent of the parties, has authority to hear, receive, and examine evidence. The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience. The expression "judicial proceeding" means a proceeding which takes place in or under the authority of any court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right,

or liability. The word 'fact' includes the fact that the witness holds any opinion or belief. The word 'material' means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material, although evidence of its existence was improperly admitted." Stephen, Dig. Crim. L. art. 135.

§ 500. **Two Witnesses Required to Prove.**—The Texas Criminal Code, art. 746, accurately states the modern rule which evidently clings to the views of the old text-writers as modified, and holds that if the perjury is not confessed in open court the falsity of the statement assigned for perjury must be proved by the positive, direct testimony of two witnesses, or by the direct, positive testimony of one witness corroborated strongly by other evidence (evidently circumstantial).

Now there may be evidence technically circumstantial which would be amply sufficient to establish perjury. Let us illustrate: B is on trial for the murder of A. C swears that he was at a certain time at a certain place in Travis county, Texas; that B and A were present at that time and place, and that no other person was present; that he saw B shoot and kill A, giving the circumstances. B is convicted and executed. Subsequent facts lead to the conclusion that C perjured himself, and he is indicted for that offense. Upon the trial it is evident that the prosecution cannot adduce direct evidence against C, but by one or more witnesses it can be shown that he was, at the time of the homicide, and on the day of the homicide specified by him, in the city of New York. Technically speaking, this would be circumstantial evidence, but of such character as to be virtually positive or direct evidence. There would be no room for inferences or presumptions, for, if the jury believed the witness, guilt would result without any process of reasoning or presumptions. *Maines v. State*, 26 Tex. App. 14.

§ 501. **One Witness Insufficient.**—The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact, except perjury and treason. In *Com. v. Butland*, 119 Mass. 317, *Mr. Justice Morton*, as the organ of the court, said: "It is not necessary that there should be two living witnesses in contradiction of the statement of the defendant to justify a conviction of perjury. It is sufficient if, in addition to one directly

opposing witness, corroborating circumstances sufficient to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence are proved. *Com. v. Parker*, 2 Cush. 212. And where the defendant's statement is contradicted by a witness, who is supported by corroborating circumstances, the evidence must ordinarily be submitted, under proper instructions, to the jury, whose province it is to judge of the weight of such corroborating circumstances." See also 1 Greenl. Ev. (13th ed.) § 257, and cases cited; *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527.

§ 502. **Proof Required that Defendant was on Oath.**—In an indictment for perjury it must be directly stated in some form of apt words that the defendant was sworn. It is not sufficient that it so appears by inference or argument. 1 Whart. Am. Crim. L. § 1287; 2 Bishop, Crim. Proc. § 912; *State v. Divoll*, 44 N. H. 142. The indictment in this case only alleges that the defendant did "depose and swear." All that is subsequently said about "said oath," and the taking and administering of the same, refers to the allegation "did depose and swear," and adds nothing to its signification or effect. The case in this respect is nearly on all fours with that of *United States v. Hearing*, 11 Sawy. 521. In that case the defendant was indicted for perjury in making a home-stead affidavit, which was set out in the indictment. This was followed by an allegation that the defendant did, before a person authorized to administer "said oath," depose and state contrary to his said oath. In sustaining a demurrer to the indictment, the court said that after setting out the affidavit there should have been an allegation "that the defendant, being then and there duly sworn by the clerk," etc., "did depose and state that such affidavit was true;" and that the allegation that the defendant did depose and state contrary to his said oath is, if anything, an attempt to assign perjury on a "said" or supposed oath, the administration of which is nowhere alleged. But the fact that the defendant was sworn must be distinctly stated. It is not sufficient that it appears by implication. *United States v. McConaughy*, 33 Fed. Rep. 168.

"A person who swears or affirms that he will truly testify, declare, depose, or certify, or that any testimony, declaration, deposition, certificate, affidavit or other writing by him subscribed, is true, in an action, or a special proceeding, or upon any hearing, or inquiry, or on any occasion in which an oath is required

by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, or who in such action or proceeding, or on such hearing, inquiry or other occasion, willfully and knowingly testifies, declares, deposes, or certifies falsely, in any material matter, or states in his testimony, declaration, deposition, affidavit or certificate, any material matter to be true which he knows to be false, is guilty of perjury." N. Y. Penal Code, § 96.

The taking of a willful false oath by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question. *Com. v. Smith*, 11 Allen, 253.

§ 503. **Impeaching Evidence always Competent.**—*Judge Andrews* in a recent case has said: "Evidence going to the credit of a witness who has given material evidence is relevant, because it helps the jury in determining the main issue. The recent cases sustain the view that perjury may be assigned by false testimony going to the credit of a witness. *Reg. v. Glover*, 9 Cox, C. C. 501; *Reg. v. Lavey*, 3 Car. & K. 26; Archb. Crim. Pr. & Pl. 817. False swearing in respect to such matter is not distinguishable in respect to moral turpitude from false swearing upon the merits; and, we think, there is no just reason for refusing to treat false swearing as perjury whenever the testimony is relevant to the case, although it may not directly bear upon the issue to be found." *People v. Courtney*, 94 N. Y. 490.

§ 504. **Testimony of an Accomplice Received with Suspicion.**—It is important to remember that all courts receive the testimony of an accomplice with suspicion. The evident infirmities of testimony given by a consort in crime, very properly impress it with elements of extreme disfavor. Where then, as has frequently happened, subsequent developments show that a conviction was secured upon perjured testimony it becomes the duty of the court, if no action be taken by the executive, to take such steps as shall bring to his attention the facts which may reasonably lead to the exercise of clemency, the presiding judge, who in the exercise of his legitimate functions has passed sentence upon a fellow citizen, under the influence of perjured testimony, should cause such steps to be taken upon the discovery of the character of the evidence upon which such conviction was based, as will lead to pardon.

These views are fully sustained by a recent decision of the supreme court of Colorado. *Klink v. People*, 16 Colo. 467.

§ 505. **Authorities Considered.**—Upon a trial for perjury, the materiality of testimony alleged to be false is a question of fact for the jury, under proper instructions by the court. 2 Bishop, *Crim. Proc.* § 935. An indictment for perjury must show on its face that the oath assigned as perjury was willful and false, and that the alleged false statement was material to the issue, or it cannot be sustained. Knobloch, *Crim. Dig.* 345; *State v. Gibson*, 26 La. Ann. 71.

Perjury may consist not only in false and corrupt testimony on the main fact, but also in such testimony on the material circumstances tending to prove the issue. Desty, *Am. Crim. L.* § 75; 3 Greenl. *Ev.* (14th ed.) § 195.

The old rule that to convict of perjury two witnesses were necessary, has been relaxed; and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned. 1 Greenl. *Ev.* §§ 257–260; *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527; *State v. Herd*, 57 Mo. 252, 1 Am. Crim. Rep. 502; *Williams v. Com.* 91 Pa. 501.

In *Reg. v. Parker*, A, having stated on an affidavit that he had paid all the debts proved under his bankruptcy except two; on an indictment for perjury on this affidavit, one of the assignments was that A had not paid all the debts proven except two; and another that certain other creditors were not paid in full. In support of this affidavit several creditors were called, who each proved the non-payment of his own debt. And it was determined that this was not sufficient to warrant conviction; that, as to the non-payment of each debt, it was necessary to have the testimony of two witnesses, or of one witness and some circumstances to supply the place of a second witness. 1 Car. & M. 639. In *Williams v. Com. supra*, the court, in deference to 1 Greenl. *Ev.* § 257, and *Reg. v. Parker, supra*, says: “The explanation ought to have been that the commonwealth is required to prove by two witnesses, or one witness and corroborative evidence, at least one corrupt payment, contribution or promise which the defendant is charged with having made or paid; and, though each of several such acts be proved by a single witness, if none be proved by two witnesses, or by one witness and corroborative proof of circumstances, there could not be a conviction.”

"The preponderance of contradictory proof must go to some one particular false statement. It will not be sufficient to prove by some inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false." Whart. Crim. Ev. § 387.

These cases sufficiently explain what is meant, when it is said that where there are several assignments of perjury, there must be, in addition to one witness, corroborative evidence as to each. Proof of any sufficient assignment will sustain a count containing several assignments of perjury. 2 Bishop, Crim. Proc. § 934; *Com. v. Johns*, 6 Gray, 274; *Harris v. People*, 64 N. Y. 148; *State v. Hascall*, 6 N. H. 352.

"Where a witness has given testimony material to the issue, and in answer to a question as to whether he had not previously made a statement different from the testimony then given, he denies having done so, the answer affects his credibility as a witness, and a charge of perjury may be founded upon it." *People v. Barry*, 63 Cal. 62, and cases cited. "It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury. And it is equally perjury if the false testimony tends to discredit the witness." 2 Bishop, Crim. Proc. § 934; *Wood v. People*, 59 N. Y. 123; *Marvin v. State*, 53 Ark. 395.

It must appear either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction. A false oath upon an immaterial matter will not support a conviction of perjury. Roscoe, Crim. Ev. 758; 2 Russell, Crimes, 639.

The whole law in reference to perjury is based upon the idea that when there is witness against witness, oath against oath, there must be other evidence to satisfy the mind. *Schwartz v. Com.*, 27 Gratt. 1025, 21 Am. Rep. 365.

Two early English cases are sometimes cited as holding that the perjury may be established by proof of the contradictory oath merely, without other evidence. One of these is an anonymous

case decided by Yates, *J.*, at the Lancaster assizes in 1764, and the ruling approved by Lord Mansfield. The other is the case of *Rex v. Knill*, 5 Barn. & Ald. 929, *note*. It is shown however in 2 Russell on Crimes, 652, that in each of these cases there were corroborating circumstances in addition to the contradictory oath. But if these cases even go to the extent which is claimed for them, they are overruled by the later English decisions. And it is now held by those courts that the defendant's own evidence upon oath is not sufficient of itself to disprove the evidence on which the perjury is assigned.

In *Reg. v. Wheatland*, 8 Car. & P. 238, *Mr. Baron Gurney* held that it was not sufficient to prove that the defendant had, on two different occasions, given direct contradictory evidence, although he might willfully have done so; but that the jury must be satisfied, affirmatively, that what he swore at the trial was false, and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn contrary at another time; it might be that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate as proved that the evidence given by the defendant at the trial was false.

In *Reg. v. Hughes*, 1 Car. & K. 519, *Tindall, Ch. J.*, said: "If you merely prove the two contradictory statements on oath, and leave it there, *non constat*, which statement is the true one." See also *Jackson's Case*, 1 Lew. C. C. 270; *Roscoe, Crim. Ev.* 767, 768.

In the United States there are but few decisions bearing upon the question. The writers on criminal law, however, lay down the rule in conformity with the English cases. 3 Whart. Am. Crim. L. § 2275; 2 Bishop, Crim. L. § 1005; 1 Greenl. Ev. 259. *Schwartz v. Com.* 27 Gratt. 1025, 21 Am. Rep. 365.

"The principle that one witness with corroborating circumstances is sufficient to establish the charge of perjury, leads to the conclusion that circumstances, without any witness, when they exist in documentary or written testimony, may combine to the same effect; as they may combine, altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact, connected with the declarations of persons or the business of human life. The principle is, that circumstances necessarily

make a part of the proofs of human transactions; that such as have been reduced to writing, in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde*, and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony. Accordingly, it is now held that a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence be relied upon to convict of perjury,—first, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances showing the corrupt intent; secondly, in cases where the matter so sworn is contradicted by a public record, proved to have been well known by the prisoner when he took the oath, the oath only being proved to have been taken; and, thirdly, in cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony existing and being found in his possession, and which have been treated by him as containing the evidence of the fact recited in it. If the evidence adduced in proof of the crime of perjury consists of two opposing statements of the prisoner, and nothing more, he cannot be convicted. 1 Greenl. Ev. §§ 258, 259.

NOTE.—*Perjury, sufficiency of evidence to convict.*

When oral testimony is relied upon to establish perjury, the general rule is that there must be the testimony of two witnesses, or of one witness corroborated by circumstances. Two witnesses are generally required. *Reg. v. Muscot*, 10 Mod. 194; *Rex v. Broughton*, 2 Strange, 1230; *Clifford v. Brooke*, 13 Ves. Jr. 134; 2 Bridgman, Index, 395; 2 Stark. Ev. 262; *Rex v. Mayhew*, 6 Car. & P. 315, *note*.

Because if a person could be found guilty on the testimony of a single witness, there would only be one oath against another. 4 Bl. Com. 358.

But where the defendant himself, in one part of his affidavit, states a fact, and afterwards, in another part, contradicts it, then one witness would be sufficient to prove the falsity of the statement first made. *Rex v. Harris*, 5 Barn. & Ald. 926, 929, *note*.

On an indictment for perjury, two witnesses are not necessary to disprove the facts sworn to by the defendant; but where there is but one witness, some other evidence must be adduced independent of, and in addition to his testimony. *State v. Hayward*, 1 Nott & McC. L. 547; *Woodbeck v. Keller*, 6 Cow. 118; *Rex v. Mayhew*, 6 Car. & P. 315; *Coulter v. Stuart*, 2 Yerg. 225; *Merritt's Case*, 4 City Hall Rec. 58; *Francis' Case*, 4 City Hall Rec. 12; 2 Russell, Crimes, 544, 545.

The oath of one witness and the declarations of the defendant inconsistent

with the oath in which perjury is assigned are sufficient. *State v. Molier*, 12 N. C. 263; *Woodbeck v. Keller*, *supra*.

This strong proof in cases of perjury seems to be required not only as to the falsity of the oath, but as to the facts sworn to. *State v. Howard*, 4 McCord, L. 159.

On a trial for perjury, the testimony of one witness is sufficient to prove that the defendant swore as is alleged in the indictment. *Com. v. Pollard*, 12 Met. 225.

The testimony of one witness, corroborated by the letters of the defendant to him, is competent and sufficient evidence of the falsity of the statement alleged as the perjury. *Com. v. Parker*, 2 Cush. 212.

Subornation of perjury may be proved by the testimony of one witness. *Com. v. Douglass*, 5 Met. 241.

The better opinion is that one who swears in honest belief, although without probable cause, is not guilty. Browne, Crim. L. 86. Citing *Com. v. Brady*, 5 Gray, 78; *State v. Chamberlain*, 30 Vt. 559; *Com. v. Thompson*, 3 Dana, 301.

Whether materiality is a question of fact or of law is mooted. Browne, Crim. L. 86; 2 Bishop, Crim. L. § 1039, *a*.

To establish perjury requires two witnesses, or circumstances corroborating a single witness. *Com. v. Pollard*, 12 Met. 225; *Williams v. Com.* 91 Pa. 493.

To constitute a valid oath, for the falsity of which perjury will lie, there must be an unequivocal and present act in some form in the presence of an officer authorized to administer oaths, by which the affiant consciously takes upon himself the obligation of an oath.

The mere delivery of an affidavit, signed by the person presenting it, to the officer for his certificate, is not such an act. *O'Reilly v. People*, 86 N. Y. 154, 40 Am. Rep. 525.

To sustain a conviction, it was necessary to show that the oath had been legally administered and taken in due form of law. *People v. Tuttle*, 36 N. Y. 431; *State v. Morris*, 9 N. H. 96; *Dodge v. State*, 24 N. J. L. 455.

While it is perjury for one knowingly and willfully to swear to a fact as true about which he knows nothing, the swearing to an affidavit, the contents of which the deponent does not know, is not necessarily perjury; to constitute the crime he must have willfully made the affidavit, knowing that he did not know its contents or the facts alleged. *Byrnes v. Byrnes*, 102 N. Y. 5.

To sustain a conviction of perjury, it is essential that the testimony given should be false, and known to be such, or not known to be true, though so alleged. If the witness testified under an honest mistake or misapprehension and honestly believed what he testified to be true, a conviction cannot be had. *People v. Dishler*, 4 N. Y. Crim. Rep. 188.

CHAPTER LVII.

BIGAMY.

- § 506. *What Constitutes the Crime.*
- 507. *What Evidence is Admissible.*
- 508. *The Case of Reg. v. Lumley Examined.*
- 509. *Rule under the Common Law.*
- 510. *Domestic Marriage, how Proved.*
- 511. *Views of an Eminent Text-writer.*
- 512. *Actual Marriage must be Shown.*
- 513. *First Marriage may be Proved by Confession.*
- 514. *General Reputation and Co-habitation as Proof of Marriage.*
- 515. *What must be Shown by the Prosecution.*
- 516. *Legal Wife not a Competent Witness.*

§ 506. **What Constitutes the Crime.**—"A person who, having a husband or wife living, marries another person, is guilty of bigamy, and is punishable by imprisonment in a penitentiary or state prison for not more than five years.

"The last section does not extend,

"1. To a person whose former husband or wife has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or,

"2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by a judgment of a court of competent jurisdiction, for a cause other than his or her adultery, or,

"3. To a person who being divorced for his or her adultery has received from the court which pronounced the divorce, permission to marry again, or,

"4. To a person whose former husband or wife has been sentenced to imprisonment for life." N. Y. Penal Code, §§ 298, 299.

§ 507. **What Evidence is Admissible.**—As to what evidence is admissible, and what evidence is sufficient, to establish a prior valid marriage, there seems to exist a contrariety of opinion and decision in the books. A valid marriage must be proved, and some statutes say "mere reputation" is not sufficient proof of the fact.

Not that reputation is not admissible as evidence to be taken in connection with other proofs to establish the fact, but that in and of itself alone and without other evidence, it is insufficient to establish the fact.

§ 508. **The Case of Reg. v. Lumley Examined.**—The judgment in *Reg. v. Lumley*, L. R. 1 C. C. 196, sustains this rule, and in fact goes further, and holds that the law makes no presumption that a person continues to live, from the proof of his or her existence at a former date. In that case, which was a prosecution for bigamy, the facts were as follows: The prisoner married one Victor at St. Helier's in the island of Jersey, in the year 1836, and lived with him in England until the middle of 1843, when they were separated, and she was taken by her parents back to Jersey, where she resumed her maiden name. On the 9th of July, 1847, she describing herself as a spinster, married Lumley, with whom she lived until March, 1864. Nothing was heard of Victor from the time the prisoner left him in 1843. No evidence was given of the age of Victor, by which it might be reasonably inferred that death had supervened. The learned judge (Lush) before whom the trial was had, directed the jury that there being no circumstances leading to any reasonable inference that he had died, "Victor must be presumed to have been living at the date of the second marriage." The question whether this direction was right or not was reserved for the opinion of the court. The case was argued before a court composed of Kelly, C. B., Cleasby, B., Byles, Lush and Brett, JJ. Lush, J., delivered the opinion of the court. He said: "We are of opinion that the direction to the jury in this case (stating it as given above) was erroneous. In an indictment for bigamy it is incumbent upon the prosecution to prove, to the satisfaction of the jury, that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible that he was living on the latter day, and the jury would in all probability find that he was so. If on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to

draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Rex v. Twynning*, 2 Barn. & Ald. 386; *Rex v. Harborne*, 2 Ad. & El. 540, and *Nepean v. Doe*, 2 Mees. & W. 894, appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the act (24 & 25 Vict. chap. 100, § 57) then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz: that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That is always a question of fact."

§ 509. **Rule under the Common Law.**—Where a suit for divorce originated at an early day, and occurring on a state of facts at a time when the common law was not the rule of action as part of the law of the country, it was held that "cohabitation and common repute, as establishing a former marriage in countries governed by the common law, cannot be admitted as evidence to annul a subsequent marriage contracted here while Texas was a part of Mexico, and solemnized according to the laws which then governed this country." And in such case it was further held that "the production of a certified copy from the office of a county recorder in the state of Missouri of a certificate under the sign manual of a justice of the peace that he had solemnized such former marriage according to law, cannot be admitted as competent evidence to establish such foreign marriage to the exclusion of the domestic marriage, without due proof of the laws of that state relating to the subject-matter." *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121; *Rice v. Rice*, 31 Tex. 174.

After the common law became the rule of action, it was held that "proof of general reputation, cohabitation of parties, and general reception as man and wife, was competent evidence in a suit for divorce." *Wright v. Wright*, 6 Tex. 3.

§ 510. **Domestic Marriage, how Proved.**—Proof of a domestic marriage, or one thus solemnized, may unquestionably be made

by the record, or by a certified copy thereof. Rev. Stat. art. 2252. This however is nowhere declared the only, or even the best mode of making the proof in domestic marriages. It is believed that even in such cases, without the introduction of the record at all, the fact may be fully and completely established by the testimony of eye-witnesses who were present when the rites were solemnized. Where no rule of proof is expressly prescribed by statute, the marriage may be proven by parol.

Mr. Bishop says: "The common course of proof is to present the record evidence, and with it, evidence to identify the parties, and these are *prima facie* sufficient. The testimony of persons present at the marriage is good evidence without the record, though the absence of the record may, under some circumstances, create suspicion." Bishop, Statutory Crimes, § 610.

Where the time and place of the first marriage are known, the rules thus announced clearly indicate the character and sufficiency of the evidence to be adduced. But in prosecutions for bigamy it happens, in a majority of instances, perhaps especially where the first marriage took place, as is generally the case with bigamists, in some other state or country, that the prosecuting officer must be wholly ignorant of, and that it is impossible for him to find out, the time and place of the prisoner's first marriage, or the names and residences of those present at its consummation. Such avenues of information are generally endeavored to be concealed by the guilty party. Where they are thus concealed, and the prosecution has been unable to find, open up and produce them, what evidence *aliunde* must and can be produced to supply their places? We find, in a note to the case of *Taylor v. State*, 52 Miss. 84, reproduced in 2 Hawley's American Criminal Reports, the following apt observations on this subject by the editor. He says: "In some states it has been held, where in a criminal case it was found necessary to prove a marriage in order to convict a defendant of a crime with which he was charged, that all the essentials to a valid marriage must be strictly proved, as well as the law of the state or country where the marriage was celebrated; and also that the admissions of the defendant's cohabitation and reputation were not sufficient evidence of such marriage. But experience has proven that such a rule in the United States amounts, in a large number of cases, to a denial of justice. Our people are migratory in their habits, and very many of our foreign

born citizens were married in the countries where they were born. To prove, in Missouri, a marriage which was celebrated in Bavaria, or even in Canada, within the rule adopted in some cases, is oftentimes an impossible task. Doubtless on account of this difficulty, the rule has been modified, and the better doctrine now is that cohabitation, reputation and admissions, are sufficient evidence of a legal marriage to submit to a jury." 2 Hawley, Am. Crim. Rep. 17. The doctrine and the opposing and conflicting authorities are all fully noted by the editor in his note.

In *Re Phené*, L. R. 5 Ch. App. 139, the question whether there was any presumption of law that a person continued to live arising upon proof of prior existence was very fully discussed and it was held that the law makes no such presumption. This was held to apply to civil and criminal cases alike. This question was also discussed at length by Field, J., in a case (*Montgomery v. Bevans*, 1 Sawy. 666) tried before him in the United States circuit court for California. He reviewed several of the English cases considered in *Re Phené*, as well as this case, and came to the conclusion that the law as declared in England in *Re Phené* was different from the law which obtains in this country, stating at the time that when this presumption of the continuance of life conflicts with the presumption of innocence, the latter prevails. In the opinion delivered in the case referred to, the learned justice says: "But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead, but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred, that is, at the end of seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails." *Montgomery v. Bevans*, 1 Sawy. 666. The rule thus stated as to these conflicting presumptions by Field, J., is sustained by *Rex v. Twynning*, 2 Barn. & Ald. 385.

§ 511. **Views of an Eminent Text-writer.**—The offense consists in entering into a void marriage where a valid one already exists. Proof of an actual or ceremonial first marriage is not necessary; but evidence that the prisoner has declared himself and has been reputed to be married will suffice. This, however, is denied in some states. In some states a party against whom a divorce is obtained may not marry while the other party is living, and disobedience is bigamy. But a remarriage out of the state, followed by a return to the state, is not bigamy, even if the second wife is an inhabitant of that state, and the parties went away to evade the law. *Browne*, Crim. L. p. 39, citing *People v. Brown*, 34 Mich. 339, 22 Am. Rep. 531; *Com. v. Jackson*, 11 Bush, 679, 21 Am. Rep. 225; *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Halbrook v. State*, 34 Ark. 511, 36 Am. Rep. 17; *Parker v. State*, 77 Ala. 77, 53 Am. Rep. 643; *State v. Hughes*, 35 Kan. 626, 57 Am. Rep. 195; *Dumas v. State*, 14 Tex. App. 464, 46 Am. Rep. 241; *Com. v. Littlejohn*, 15 Mass. 163; *State v. Roswell*, 6 Conn. 446; *People v. Humphrey*, 7 Johns. 314; *Green v. State*, 21 Fla. 403, 58 Am. Rep. 670; *Com. v. Putnam*, 1 Pick. 136; *People v. Faber*, 92 N. Y. 146, 44 Am. Rep. 357; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505.

§ 512. **Actual Marriage must be Shown.**—Mr. Bishop says: "Record evidence and evidence of witnesses present at the ceremony will be required where these can be had. But where the circumstances of the particular case show that these cannot be had, and in all cases as confirmatory of them, and in the proper cases as dispensing with them, it is competent to show the admissions of the party or his prior cohabitation under pretense of marriage, and various other things of like import." Bishop, *Statutory Crimes*, § 609.

In *Com. v. Jackson*, 11 Bush, 679, 21 Am. Rep. 225, where the question before the court was what proof of marriage was admissible and sufficient in a case of bigamy, the court says: "The circuit judge seems to have been of the opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses who were present at the solemnization of the marriage rites; or, in other words, that the declarations and conduct of defendant, admitting his marriage, and

living with and recognizing the woman as his wife, were not sufficient to warrant the jury in finding a verdict against him. This is a subject about which there is irreconcilable conflict in the authorities. In Massachusetts, New York and Connecticut, and perhaps in some other states, it has been held that in prosecutions for bigamy an actual marriage of the prisoner must be proven, and that neither cohabitation, reputation, nor the confessions of the prisoner are admissible for that purpose, or if admissible, are not of themselves sufficient to warrant conviction. *Com. v. Littlejohn*, 15 Mass. 163; *State v. Roswell*, 6 Conn. 446; *People v. Humphrey*, 7 Johns. 314. On the other hand, it has been held in South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine and Illinois, that in prosecutions for bigamy the confessions of the prisoner deliberately made are admissible as evidence to prove marriage in fact, and in some of those states that such confessions are of themselves sufficient to authorize the jury to convict. *State v. Britton*, 4 McCord. L. 256; *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783; *Warner v. Com.* 2 Va. Cas. 95; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *Com. v. Murtagh*, 1 Ashm. 272; *Ferner v. Hallacher*, 8 Serg. & R. 159; *Cayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 392; *State v. Hodgskins*, 19 Me. 155; *Jackson v. People*, 3 Ill. 231."

§ 513. **First Marriage may be Proved by Confession.**—In *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481, it was held by the Supreme Court of the United States, that "on an indictment for bigamy the first marriage may be proved by the admissions of the prisoner, and it is for the jury to determine whether what he said was an admission that he was actually and legally married according to the laws of the country where the marriage was solemnized." And in addition to the cases cited above in *Jackson v. People*, 3 Ill. 231, this last opinion cites *Reg. v. Simmons*, 1 Car. & K. 164, cited in 1 Russell, Crimes (Greaves' ed.) 218; *Dutchess of Kingston's Case*, 20 How. St. Tr. 355; *Rex v. Trueman*, 1 East, P. C. 470; *State v. Libby*, 44 Me. 469; *Rex v. Norwood*, 1 East, P. C. 470; *Reg. v. Newton*, 2 Mood. & R. 503; *State v. McDonald*, 25 Mo. 176; *State v. Seals*, 16 Ind. 352; *Brown v. State*, 52 Ala. 338; *Williams v. State*, 44 Ala. 24. In *Langtry v. State*, 30 Ala. 536, it was held that in prosecutions

for bigamy the first marriage may be proved by cohabitation and the confessions of the prisoner; and such evidence, if full and satisfactory, is sufficient to authorize a conviction without the production of the records or the testimony of a witness who was present at the ceremony.

It was held in England and in some of the states of this Union that evidence of declarations as to a former marriage was competent in the trial of an indictment for bigamy against the party making them. *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481.

But in New York it has been held that such evidence was not sufficient in a prosecution for bigamy, to establish a marriage even against the party making the admissions. *People v. Humphrey*, 7 Johns. 314; *Gahagan v. People*, 1 Park. Crim. Rep. 378. The court in the latter case held them admissible to corroborate the proof of the actual marriage.

§ 514. **General Reputation and Cohabitation as Proof of Marriage.**—It appears to us to be well settled from many authorities that general reputation, cohabitation, and admissions or confessions of the party are all admissible evidence of the fact of the first marriage. General reputation alone is insufficient, but taken in connection with cohabitation and admission, is competent evidence to establish a *prima facie* case sufficient to sustain a verdict and judgment of conviction for bigamy. Whenever such evidence establishes, in the minds of the jury, beyond a reasonable doubt, the existence of the fact of a valid first marriage, then it is sufficient in that regard to sustain a verdict and judgment for bigamy. A valid marriage must be proven, and if such evidence is relied upon it must establish the existence of a valid marriage to the satisfaction of the jury beyond a reasonable doubt.

In *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481, where it is held, approving *Reg. v. Simmonsto*, 1 Car. & K. 164, that "on an indictment for bigamy the first marriage may be proved by the admissions of the prisoner, and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized." The court, of itself high authority, cited, as also sustaining this view, *Reg. v. Upton*, 1 Car. & K. 165, *note*, cited in 1 Russell, Crimes (Greaves' ed.) 218; *Dutchess of Kingston's Case*, 20 How. St. Tr. 355; *Rex v. Trueman*, 1 East, P. C.

470; *Cayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 391; *State v. Libby*, 44 Me. 469; *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783; *State v. Britton*, 4 McCord, L. 256; *Warner v. Com.* 2 Va. Cas. 95; *Rex v. Norwood*, 1 East, P. C. 470; *Com. v. Murtagh*, 1 Ashm. 272; *Reg. v. Newton*, 2 Mood. & R. 503; *State v. McDonald*, 25 Mo. 176; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *State v. Seals*, 16 Ind. 352; *Arnold v. State*, 53 Ga. 574; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Brown v. State*, 52 Ala. 338; *Williams v. State*, 44 Ala. 24; *Com. v. Jackson*, 11 Bush, 679, 21 Am. Rep. 225. The court then goes on to say (*Miles v. United States*, 103 U. S. 312, 26 L. ed. 484) that the declarations of the defendant "appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that they had reference to a formal marriage contract," and hold that there was no error in the court below admitting the declarations, nor in the charge of the judge, which was, "The declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage, and that such marriage might be proved like any other fact, by the evidence of the defendant, or by circumstantial evidence."

So in *Reg. v. Newton*, 2 Mood. & R. 503, Wightman, *J.*, held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. 1 Roscoe, Crim. Ev. (8th Am. ed.) 454.

§ 515. **What must be Shown by the Prosecution.**—The prosecutor must prove the two marriages; that at the time of the second marriage the offender was legally married to another. The law will not presume a valid marriage in cases of bigamy as it will in civil cases. *Rex v. Jacobs*, 1 Mood. C. C. 140.

Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson. Parke, *J.*, held the proof to be insufficient, and directed an acquittal. He subsequently expressed a decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman,

by the name of, and who called herself Hannah Wilkinson," because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name, and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid. *Rex v. Drake*, 1 Lew. C. C. 25.

If, in a case of bigamy, there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register which is produced to prove the first marriage, the prisoner must be married, and having a husband alive, married with the widower of the deceased sister, she is guilty of bigamy, though by 5 & 6 Wm. IV. chap. 54, such marriage is declared to be null and void to all intents and purposes whatsoever. In deciding the point, *Lord Denman, Ch. J.*, said: "I have no doubt whatever that this marriage was null and void under the act mentioned, but that circumstance does not, in my opinion, affect the charge against the female prisoner. Her offense consisted, not in the contracting that which, but for the existence of her husband, would have been a legal marriage, but in her going through the ceremony of marriage, and appearing to contract that which was a legal and binding union, at the time when she already had a husband living. That single fact constitutes the crime and the proof of it, and whether the union secondly contracted would or would not be null and void, if contracted under other circumstances, is a matter wholly immaterial to the inquiry. If it were otherwise in this case, the same argument would apply to all other cases; for if the second marriage be not null and void, the crime of bigamy cannot be committed. I am, therefore, decidedly of opinion that Jane Bawm committed bigamy by marrying with Thomas Webbe, though it was within the prohibited degree of affinity." *Reg. v. Bawm*, 1 Cox, C. C. 33.

The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid everywhere. *Phillips v. Gregg*, 10 Watts, 158.

The prosecutor must prove the two marriages, that at the time of the second marriage the offender was legally married to the other. The law will not presume a valid marriage in cases of bigamy as it will in civil cases. *Smith v. Huson*, 1 Phillim. 257; *Rex v. Jacobs*, 1 Mood. C. C. 140.

If the first marriage be void, an indictment for bigamy cannot be sustained. Thus, if a woman marry A, and in the lifetime of A marry B, and after the death of A, and whilst B is alive, marry C, she cannot be indicted for bigamy in her marriage to C, because her marriage with B was a mere nullity. 1 Hale, P. C. 693.

In *Reg. v. Simmonsto*, 1 Car. & K. 164, it was held that "on an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized.

The same view is sustained by the following cases: *Reg. v. Upton*, 1 Car. & K. 165, *note*, cited in 1 Russell, Crimes (Greaves' ed.) 218; *Dutchess of Kingston's Case*, 20 How. St. Tr. 355; *Rex v. Trueman*, 1 East, P. C. 470; *Cayford's Case*, 7 Me. 57; *Ham's Case*, 11 Me. 391; *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783; *State v. Britton*, 4 McCord, L. 256; *Warner v. Com.* 2 Va. Cas. 595; *Rex v. Norwood*, 1 East, P. C. 470; *Com. v. Murtagh*, 1 Ashm. 272; *Reg. v. Newton*, 2 Mood. & R. 503; *State v. Libby*, 44 Me. 469; *State v. McDonald*, 25 Mo. 176; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton v. State*, 16 Ohio, 173, 47 Am. Dec. 373; *State v. Seals*, 16 Ind. 352; *Arnold v. State*, 53 Ga. 574; *Brown v. State*, 52 Ala. 338; *Com. v. Jackson*, 11 Bush, 679, 21 Am. Rep. 225; *Williams v. State*, 44 Ala. 24.

It has been said, that upon a charge of bigamy, a marriage in fact, as distinguished from the acknowledgment and cohabitation of the parties must be proved. *Morris v. Miller*, 4 Burr. 2057; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446. But this rule, even in the case of bigamy, is far from being well established. What weight the evidence of the admission and acts of the party accused is to have in establishing the fact of marriage, must depend very much, of course, upon the peculiar circumstances of the case. But I am unable to see why it should be necessary to prove the first marriage by eye-witnesses of the ceremony, or those who heard the marriage agreement. In every other case, the acts and admissions of a party, even though he be accused of a capital offense, are evidence against him. It is not easy to say why such evidence should not be received to prove a

marriage. What weight the evidence should be allowed to have, is quite a different question. It may not be sufficient to warrant a conviction, but upon principle, it must be regarded as competent. It should be received for what it is worth.

Under the rule that a connection confessedly illicit in its origin or shown to have been such, will be presumed to retain that character until some change is established, it is not essential in order to establish such a change, or to show the precise time or occasion thereof; it is sufficient if the facts show that a change must have occurred transforming the illicit intercourse into cohabitation matrimonial in its character. *Badger v. Badger*, 88 N. Y. 547, 42 Am. Rep. 263.

§ 516. **Legal Wife not a Competent Witness.**—Under the prosecution for bigamy under the statute of 1 Jac. chap. 11, it was said by Lord Hale: "The first and true wife is not allowed to be a witness against her husband, but I think it clear the second may be admitted to prove the second marriage for she is not his wife, contrary to a sudden opinion delivered in July, 1664, at the Assizes in Surrey, in *Arthur Armstrong's Case*, for she is not so much as his wife *de facto*." 1 Hale, P. C. 693.

So in East's Pleas of the Crown the rule is thus laid down: "The first and true wife cannot be a witness against her husband, nor *vice versa*; but the second may be admitted to prove the second marriage, for the first being proved she is not so much as wife *de facto*, but that must first be established." 1 East, P. C. 469. The text of East is supported by the following citation of authorities: 1 Hale, P. C. 693; 2 MS. Sum. 331; *Ann Cheney's Case*, O. B. May, 1730, Sergt. Foster's MS.

In Peake's Evidence (Norris), 248, it is said: "It is clearly settled that a woman who was never legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife."

The result of the authorities is that as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court, the second may be admitted to prove the second marriage but not the first, and the jury should have been so instructed.

Any person who was present when the marriage took place is a competent witness to prove the marriage; and it is enough that he is able to state that the marriage was celebrated according to the usual form, and he need not be able to state the words used. *Fleming v. People*, 27 N. Y. 329; *Lord v. State*, 17 Neb. 526.

CHAPTER LVIII.

RAPE.

§ 517. *The Term Defined.*

518. *Offense must be "by Force, against her Will."*

519. *What must be Shown.*

520. *Reputation of the Prosecutrix for Chastity.*

521. *Complaint of the Outrage may be Shown.*

522. *Caution as to the Admission of Uncorroborated Testimony.*

523. *Utmost Resistance must be Shown.*

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525. *Evidence of Previous Offenses or Attempts.*

526. *Consent Secured by Fraud.*

§ 517. **The Term Defined.**—"Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent. A person perpetrating such an act, or an act of sexual intercourse with a female not his wife,

"1. When the female is under the age of sixteen years; or,

"2. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or,

"3. When her resistance is forcibly overcome; or,

"4. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or,

"5. When her resistance is prevented by stupor or by weakness of mind produced by an intoxicating narcotic, or anæsthetic agent, administered by, or with the privity of, the defendant; or,

"6. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant,—is punishable by imprisonment for not less than five nor more than twenty years." N. Y. Penal Code, § 278.

§ 518. **Offense must be "by Force, against her Will."**—The statutes contemplate that the offenses shall be "by force, against her will." McClellan's Dig. p. 355, § 36; 2 Bishop, Crim. L.

§ 1113; *Charles v. State*, 11 Ark. 389; *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79. There must be a concurrence of these two ingredients. *Cato v. State*, 9 Fla. 163, 184. If force was used and yet the carnal knowledge was not against the will of the female, the crime of rape has not been committed. In some states it has been held that there must be resistance to the extent of the woman's ability. Thus in New York, in *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349, where a female was but fourteen years old, the decision is, that to constitute the crime of rape of a female over ten years of age, when it appears at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers, or terrified by threats, or in such place and position that resistance would have been useless, it must be made to appear that she did resist to the extent of her ability at the time and under the circumstances. See also *People v. Morrison*, 1 Park. Crim. Rep. 625; *People v. Quin*, 50 Barb. 128. In other states it is said that there must be the utmost reluctance and the utmost resistance upon the part of the female, or her will must be overcome by fear of the defendant (*Strang v. People*, 24 Mich. 6) and that "the passive policy," or a half way case will not do, or resistance of such an equivocal character as to suggest actual consent, or not a very decided opposition. *State v. Burdordf*, 53 Mo. 65; *People v. Brown*, 47 Cal. 447; *People v. Hulse*, 3 Hill, 309, 315, 317. If the jury entertain a reasonable doubt of such a reluctance, they should acquit (*Strang v. People*, *supra*) and where upon a trial the vital issue was whether the act was committed by force and against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act. *Brown v. People*, 36 Mich. 203.

In *Com. v. McDonald*, 110 Mass. 405, the trial judge charged that the act of the defendant must have been without the woman's consent, and there must have been sufficient force used to accomplish his purpose; that the jury must be satisfied that there was no consent during any part of the act, and that the degree of resistance was frequently an essential matter for them to consider in determining whether the alleged want of consent was honest and real; but that there was no rule of law requiring a jury to be satisfied that the woman, according to their measure of her

strength, used all the physical force in opposition of which she was capable; and this charge was held by the supreme court to be appropriate and correct. Likewise in *State v. Shields*, 45 Conn. 256, the supreme court of Connecticut approved a charge that there was no rule of law that there could be no rape unless the woman manifested the utmost reluctance and made the utmost resistance, but that the jury must be satisfied that there was no consent during any part of the act, and that the degree of resistance was an essential matter for them to consider in determining whether there was an honest and real want of consent.

Mr. Bishop in his work on Criminal Law (vol. 2, § 1122) says that it is plain that in the ordinary case where a woman is awake, of mature years, of sound mind and not in fear, a failure to oppose the carnal act is consent, and though she objects verbally, if she makes no outcry and no resistance, she by her conduct consents, and the carnal act is not rape in the man; that the will of the woman must oppose the act, and that any intimation favoring it is fatal to the prosecution. He, however, disapproves the doctrine as to resistance affirmed in *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349, and says that the text of the law, and the better judicial doctrines require only that the case shall be one in which the woman did not consent; her resistance however, must not be a mere pretense, but in good faith. The text of the law referred to by him is the Statute of Westminster II. (13th ed. 1) chap. 34, A. D. 1285, which he gives in § 1111, as follows: "If a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member. And likewise where a man ravisheth a woman, married, lady, damsel, or other, with force, although she consent after, he shall have judgment as before is said (that is of life and member) if he be attainted at the king's suit, and there the king shall have the suit." *Hollis v. State*, 27 Fla. 387.

If consent in any degree at any time of the occasion be yielded by the female, the crime is not consummated; but the yielding to overpowering force may be submission and not consent. *Reg. v. Fletcher*, Bell, C. C. 63, 8 Cox, C. C. 131, 5 Jur. N. S. 179. The offense requires of her the utmost reluctance, and the utmost resistance on her part. *People v. Morrison*, 1 Park. Crim. Rep. 625; *People v. Quin*, 50 Barb. 128; *People v. Dohr-*

ing, 59 N. Y. 374, 17 Am. Rep. 349. This rule is to be uniformly observed in cases of this character. But what is such resistance, has relation to the circumstances attending the transaction. If she was overpowered by force, and was unable, for want of strength, to actively resist any longer, or if such resistance was absolutely useless, the crime may have been committed. *Reg. v. Hallet*, 9 Car. & P. 748; *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283; *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856.

To support the charge of the crime in question, assuming that the prosecutrix was conscious and had possession of her mental and physical powers, it was necessary that she should resist to the extent of her ability, and be overcome by the physical force of the defendant, unless she was by threats terrified into a submission, or was in a place and so situated that resistance would have been useless. *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366.

In such cases, although the woman never said "yes," nay more, although she constantly said "no," and kept up a decent show of resistance to the last, it may still be that she more than half consented to the ravishment. Her negative may have been so irresolute and undecided, and she may have made such feeble fight as was calculated to encourage, rather than repel the attack. And yet, a sense of shame, arising either from an apprehension of the consequences which may follow the illicit connection, or from the fact that the matter has already been known to others, may stimulate the woman to call that a rape, which was in truth a sin of a much less odious character. And when once she has given the transaction a name, she has no alternative but to confess herself false, as well as guilty, or to go into court and arraign the supposed offender. And then, as there was no express consent, she is enabled to swear to the force without any such great stretch of conscience as would be necessary where the whole story was a tissue of falsehood from beginning to end. Cases of this character do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation. On the contrary, courts and juries cannot well be too cautious in scrutinizing the testimony of the complaining witness, and guarding themselves against the influence of those indignant feelings which are so naturally excited by the enormity of the alleged offense. *Taylor v. State*, 111 Ind. 279.

§ 519. **What Must be Shown.**—"Sexual penetration" can mean nothing but the piercing into the distinctive organ of sex. Commissioners on Revision [ed. of 1865], § 321; N. Y. Penal Code, § 280; 2 Rev. Stat. 735. Where there is absolutely no proof of "sexual penetration"—of a rape accomplished, at most there is only proof of an attempt. *Reg. v. McRue*, 8 Car. & P. 641; Guy, Forensic Medicine [1st Am. ed.], with notes by Lee, 65; Roscoe, Crim. Ev. [10th ed.] 902; Beck, Medical Jurisprudence, 53.

In the United States proof of the slightest penetration without emission has always been regarded as sufficient. *State v. Hargrave*, 65 N. C. 466; *Waller v. State*, 40 Ala. 325; *Com. v. Thomas*, 1 Va. Cas. 307; *State v. Sullivan*, Add. Rep. 143; 1 Swin. Jud. Reg. 98; 1 Hale, P. C. 628 and *note*; Taylor, Medical Jurisprudence (7th Am. ed.) 701; Ogston, Lect. Medical Jurisprudence, 90; Beck, Medical Jurisprudence, 229, 223. The essence of the crime is not the begetting of a child, nor the physical injury inflicted, but the violence done to the feelings and person of the sufferer and to her sense of honor and virtue. *People v. Sullivan*, *supra*, 1 Barb. Crim. L. [3d ed.] 77; 1 Swin. Jud. Reg. 98. No form of words is necessary to prove penetration, the proof, therefore, can be inferred from circumstances apart from the statement of the party injured. *People v. Crowley*, 102 N. Y. 234; Whart. Am. Crim. L. § 555.

Nothing is better established than that the prosecutrix, in trials of this nature, may testify as to what she did or said after the commission of the offense. In the language of Sir William Evans, 2 Pothier, Ev. 289 :

"Upon accusations for rape, for the forbearance to mention the circumstances for a considerable length of time is, in itself, a reason for imputing fabrication, unless repelled by other considerations, the disclosure made upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material; and the evidence of them is certainly admitted without objection."

The text-books speak thus : "It must appear that the offense was committed without the consent of the woman, but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death, or by duress." Roscoe, Crim. Ev. (6th London & 6th Am. ed.) 806; 1 East, P. C. p. 444, § 7.

It is an extreme which they put, that shall be no excuse. So in Viner it is laid down, that a woman cannot be ravished by one man without some extraordinary circumstances of force. 18 Vin. Abr. *Rape*, p. 155, pl. 11. In *People v. Abbot*, 19 Wend. 192, Cowen, J., says: "Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received." Why, if the jury are not to inquire whether there were the utmost reluctance and the utmost resistance? This saying has been cited with approval in more than one instance. *People v. Morrison*, 1 Park. Crim. Rep. 625; *People v. Quin*, 50 Barb. 128; *Reynolds v. People*, 41 How. Pr. 179.

Certainly, if a female, apprehending the purpose of a man to be that of having carnal knowledge of her person, and remaining conscious does not use all her own powers of resistance and defense, and all her powers of calling others to her aid, and does yield before being overcome by greater force, or by fear, or being surrounded by hostile numbers, a jury may infer that, at some time in the course of the act, it was not against her will.

Our statutes provide that: "In prosecutions for the offense of rape, proof of penetration shall be sufficient evidence of the commission of the offense." Under this statute, however it may have been at common law, the slightest penetration of the genital organ of the male into that of the female is sufficient, other elements of the crime being present, to establish guilt. *Brauer v. State*, 25 Wis. 413; *State v. Tarr*, 28 Iowa, 397; Bishop, Statutory Crimes, § 488.

In commenting upon some of the later cases the authors of a recent work on medical jurisprudence justly say: "In our opinion this is not only good law, but common sense. That a scoundrel who attempts the chastity of a child or a young girl should escape punishment merely because her youth, or the imperfect development or narrowness of the parts prevent his fully consummating the crime, appears to us as undesirable as it would be unjust." Woodman & Tidy, Forensic Medicine & Toxicology, 640.

"The jury," says Mr. Bishop, "may infer the penetration from circumstances, without direct proof." Bishop, Statutory Crimes, § 488. Discussing the same question, the supreme court of Iowa said: "Nor is the prosecution bound to show the fact of actual penetration by the prosecutrix herself." *State v. Tarr*, *supra*.

§ 520. **Reputation of the Prosecutrix for Chastity.**—One of the most serious contentions that vex the appellate tribunal in cases of this character, arises from the attempt to prove the general reputation of the prosecutrix for chastity, before her character has been attacked. The general rule undoubtedly is, that evidence to sustain a witness whose character or credibility has not been attacked by the opposite party is inadmissible, the character being no part of the *res gestæ*; but the strenuous argument in these cases is to the effect, that there is a well recognized exception to this rule in cases of rape or assault with intent to commit rape. In such cases, the general character of the prosecutrix for chastity being involved, it may be sustained, whether attacked or not.

Upon this precise point the authorities are few, and they are not agreed. In *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90, evidence to prove the general character of the prosecutrix for truth to be good, though not impeached, was admitted by the trial court, and it was said by the appellate court that it would not be going too far, perhaps, to say that the general character of the witness, who is the victim of the outrage, in prosecutions for rape may always be shown. The case, however, was disposed of on other grounds, and the point was not decided.

In *Turney v. State*, 8 Smedes & M. 104, decided in 1847, Thacker, *J.*, from whose opinion on this point there seems to have been no dissent, said: "The party ravished is a competent witness to prove the fact, but the credibility of her testimony must be left to the jury. It is legitimate to support her credibility by evidence of her good fame, or to attack it by evidence of her evil fame." "Such evidence," he added "tends to show, that the connection with the woman was had against or with her consent." This was all that was said upon the point, and no reference was made to the case of *People v. Hulse*, presently to be mentioned. The only authority referred to is 4 Bl. Com. 213, where the author adopting the language of Sir Matthew Hale in his Pleas of the Crown, as do most of the text-writers on the subject, said: "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discovered the

offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence." See also East, P. C. 445; 1 Russell, Crimes, 562; 2 Whart. Am. Crim. L. (7th ed.) § 1149; 3 Greenl. Ev. § 212.

On the other hand, in *People v. Hulse*, 3 Hill, 309, decided in 1842, the supreme court of New York, composed of Nelson, *Ch. J.*, and Bronson and Cowen, *JJ.*, in an able opinion, declared that there was no authority for making the case of a witness swearing to a rape an exception to the general rule of evidence in relation to proof of character, and that as a question of principle no such exception should be made. Such evidence, it was thought, is calculated to draw off the attention of the jury from the true point in controversy, and to cause them to find a verdict of guilty more upon the good character of the prosecutrix, than upon a rational conviction of the defendant's guilt. And referring to the language of Lord Hale, above mentioned, it was denied that that judge meant to say that the good character of the prosecutrix may be shown before any question of character or "good fame" has been raised by the defense. "No one," it was said, "can read what Lord Hale has said in relation to prosecutions of this kind, without being satisfied, that greatly as he abhorred the crime of rape, he was very far from thinking that any unusual weight should be thrown into the scale against the accused. On the contrary, he regarded it as a case calling for unusual caution on the part of the judge and the jury, and where the testimony of the complaining witness should be received with more than ordinary doubt and suspicion." And the language of Lord Hale, also referred to by Blackstone, was quoted at length to sustain this conclusion.

This view of the law, which we consider the true one, is adopted by a philosophical writer, who, in treating of the evidence in a prosecution for rape, says that there are cases, perhaps exceptional in their circumstances, wherein sustaining evidence of the good character of the prosecutrix has been received when she was not attacked, but that the general and better doctrine admits it only to repel an attack. And he cites the cases above mentioned, which are the only ones to which our attention has been called. *Coleman v. Com.* 84 Va. 1; 2 Bishop, Crim. Proc. § 964.

The authority of Lord Hale has been occasionally invoked to

show that the case of a woman swearing to a rape, forms an exception to the general rule, and that evidence may always be given in support of her general character. It is true that Hale mentions the "good fame" of the witness as one of the "concurring evidences to give greater probability to her testimony;" but he nowhere intimates that he may call compurgators before the question of character or "good fame" has been raised on the part of the defense. 1 Hale, P. C. (ed. 1778) 633. And although what is here said by Hale has been repeated by most of the elementary writers upon crimes and criminal evidence since his day, not one of them has mentioned the case of a woman swearing to a rape as an exception to the general rule of evidence which we have been considering. 4 Bl. Com. 213; 1 East, P. C. 445; 3 Chitty, Crim. L. 812; 3 Stark. Ev. 1267; Roscoe, Crim. Ev. 710; Archb. Crim. Pr. & Pl. 453. If there be any such exception, we should certainly be able to find it laid down in some book of authority. Mr. Phillips, although he had no occasion to controvert a proposition of which he had never heard, has virtually denied the existence of any such exception. He says, if on cross-examination she admit her own misconduct in some earlier transactions, it would be proper on re-examination, to inquire into her conduct subsequent to such transactions, for the purpose of restoring her credit. And then, on the authority of *Rex v. Clarke*, 2 Stark. 241, he adds: other witnesses may also be called, to show that she has since retrieved her character. 1 Phil. Ev. (ed. 1839) 176. He puts the right to call sustaining witnesses on the ground that her character had been attacked.

In many of the states the statute, instead of reading "of good repute," provides that the female shall be "of previous chaste character." Under such a statute the character of the prosecutrix may be impeached by proof of specific acts of lewdness. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Carpenter v. People*, 8 Barb. 603; *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17; *People v. Brewer*, 27 Mich. 134; *People v. Clark*, 33 Mich. 112; *State v. Bryan*, 34 Kan. 63.

Upon the issue the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad, is competent, and for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this

ground, and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to that charge in the indictment. In *Rea v. Barker*, 3 Car. & P. 589, it was held that the prosecutrix might be asked, with a view to contradict her, whether she was not on a specified day after the alleged offense walking in High street, with a woman Oxford, looking out for men, and the further question whether upon another specified day after the alleged offense she was not walking in High street with a woman reputed to be a common prostitute. This evidence was competent, not for the purpose of impeaching the general credibility of the witness, but proper for the consideration of the jury upon the question whether she assented to the intercourse. It was competent for him to prove, by any one knowing the fact, that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse with them, and the weight of such testimony was in no respect impaired by the further fact that the men so received took liquor with them on these occasions, of which they and she partook to great excess. The testimony offered, if true, would have shown the complainant to be a common prostitute; proof more satisfactory than that of a bad general reputation for chastity. It was an offer to show by direct evidence not only this, but that the complainant was a common prostitute and in the habit of plying her vocation at the place where she dwelt. Whether evidence of particular acts of criminality by the prosecutrix is competent, is a question upon which the authorities differ, but one not necessary to determine in all cases. In *People v. Abbot*, 19 Wend. 192, such proof was held to be admissible. In *People v. Jackson*, 3 Park. Crim. Rep. 391, it was held incompetent. The authorities are all cited and ably examined in the opinions in these cases by Cowen, *J.*, in the former, and by S. B. Strong, *J.*, in the latter. See also *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309; Roscoe, Crim. Ev. 810.

NOTE.—The exhaustive opinion of Judge Cowen leaves nothing to be said upon the subject of character, when brought in question by the trial of a crime so heinous and offensive, as that under review. His honor says: "The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defense on circumstantial evidence. Any fact

A person's character for chastity, when it is relevant, is not shielded from inquiry. It is a disagreeable subject of investiga-

tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received. That there was not an immediate disclosure, that there was no outcry, though aid was at hand and that known to the prosecutrix, that there are no indications of violence to the person, are put as among the circumstances of defense; not as conclusive, but as throwing distrust upon the assumption that there was a real absence of assent. 1 Hale, P. C. 633. A mixed case will not do; the connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raises a doubt of assent?—that the triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew?—between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And how is the latter case to be made out? How more directly and satisfactorily than by an examination of the prosecutrix herself? I speak not now of her privilege, though the question being relevant, I do not believe there is either principle or authority which would allow it to her. 1 Phil. Ev. (7th ed.) 279; *Roberts v. Allatt*, 1 Mood. & M. 192. But she did not claim any privilege. The question was overruled on another ground, whereas it may always be asked even in a case of the plainest privilege. *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156; *Thomas v. Newton*, 2 Car. & P. 606; *Southard v. Rexford*, 6 Cow. 234.

On a question of scienter you may show other acts, as in passing counterfeit money or bills. Why? Because in the practiced vender of bad coin or bad bills we more readily infer a guilty knowledge than in the novice. 1 Phil. Ev. (7th ed.) 179, and cases cited. And will you not more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia? Both knowledge and assent are affections of the mind, and the mode of proving both, rests on the same principle in the philosophy of evidence.

I am fully aware of the two cases of *Rex v. Hodgson*, Russ. & R. 211, and *Rex v. Clarke*, 2 Stark. 241, in which it was held that you shall not be permitted to inquire of the prosecutrix's connection with other men. It is with a view to these cases that I have thought it my duty to consider the question of *a priori*, and I must say that they appear to me entirely anomalous, not only when compared with the cases in respect to circumstantial evidence generally, but with adjudications in respect to evidence receivable on trials for this very crime. It seems, in the first place, to be perfectly agreed that you may prove the prosecutrix to be in fact (not merely by general reputation, but in fact) a common prostitute; because, say Mr. East and Mr. Roscoe, that is a proper circumstance to be submitted to the jury. 1 East, Crown L. 444, 445; Roscoe, Crim. Ev. 708. It has been repeatedly adjudged that, in the same view, you may also show a previous voluntary connection between the prosecutrix and the prisoner. *Rex v. Aspinwall*, cited in 2 Stark. Ev. (7th Am. ed.) 951; *Rex v. Martin*, 6 Car. & P. 562. Why is this? Because there is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent, as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the

tion, but the law makes no discrimination between subjects that are agreeable and those that are disagreeable. *Wood v. Gale*, 10

lewd embraces of another, and the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law? That I admit, and so are the common prostitute and the concubine. If either have, in truth, been feloniously ravished, the punishment is the same, but the proof is quite different. It requires that stronger evidence be added to the oath of the prosecutrix, in one case than in the other. Shall I be answered that an isolated instance of criminal connection does not make a common prostitute? I answer, yes; it only makes a prostitute, and I admit introduces a circumstance into the case of less amount; but the question is not whether it be of more or less persuasive force; it is one of competency; in other words, whether it be of any force at all.

The decisions of the courts of Westminster Hall are certainly very high evidence of the law. In most cases I agree that we ought to regard them as conclusive; but no court can overrule the law of human nature, which declares that one who has already started on the road of prostitution would be less reluctant to pursue her way than another who yet remains at her home of innocence and looks upon such a career with horror. I have had long occasion to know and to consider much, the two cases cited as adverse to the reception of this evidence; and I never yet could bring myself to doubt that circumstances much more remote and of less influence are constantly received on the very best authority. Those cases are anomalous in more than one respect. While they reject evidence of the fact, they receive evidence of reputation of the fact, or mere hearsay. They seem to suppose that the testimony was proposed to shake the general credibility of the witness, as if it went to truth and veracity. That is not so. It goes to her credibility in the particular matter, to a circumstance relevant to the case in hand, from which the jury are asked to say she did consent; and it may be proved by the prosecutrix, or if she deny it, by others. It is most strange that a reputation of a want of chastity should be preferred in evidence to direct proof. No reason is given for such a distinction by the court; but the counsel in *Rex v. Hodgson*, Russ. & R. 211, did say, that general reputation alone was to be received, because it was not to be presumed the prosecution would come prepared to meet evidence of the particular fact. Such a reason would go to show that every circumstance in a chain must be shown by reputation instead of ocular proof. I am unwilling to deprive prisoners of any evidence sanctioned by authority in this kind of prosecution. Their case is often hard enough. 1 Hale, P. C. 635, 636. But I never yet could see why reputation should be received upon any principle peculiar to such a case. It cannot be, as supposed in *Rex v. Clarke*, 2 Stark. 241, that a woman's character is in issue, in any other sense than that of every witness, who may be impeached as generally unworthy of credit. The books are certainly strong and uncontradicted that on trying this offense her character as a common strumpet may be proved for such a purpose (*Rex v. Barker*, 3 Car. & P. 589) though it is not clearly held to be receivable against a witness in other prosecutions as an impeachment of veracity. There are two decisions in Massachusetts on the question, which conflict; the first holding that it may, the second that it shall not be received. *Com. v. Murphy*, 14 Mass. 388; *Com.*

N. H. 247, 34 Am. Dec. 150. Sexual crimes are not excepted, as a peculiar class, from the operation of the general rule that admits relevant evidence. On an indictment for adultery, evidence of previous improper familiarities is competent. *State v. Wallace*, 9 N. H. 515; *State v. Marvin*, 35 N. H. 22; *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420; *Com. v. Lahey*, 14 Gray, 91. In *Com. v. Horton*, 2 Gray, 354, and *Com. v. Thrasher*, 11 Gray, 450, it was held that although improper familiarities were competent, proof of actual adultery (other than that charged) committed by the same parties with each other was incompetent; but in *Thayer v. Thayer*, 101 Mass. 111, 113, 114, 100 Am. Dec.

v. Moore, 3 Pick. 194. Without expressing an opinion whether it may commonly be used even as an item in the estimate of general credibility, I certainly do not feel clear that it should be repudiated in respect to the prosecutrix, where the trial is for a rape. The strong balance of the books is, that you are never confined in such inquiry to general character for truth and veracity merely, but may ask as to the general moral character, and stop there. I speak both of English and American cases, which are numerous, and all of which I think I have examined. I do not now remember one which holds that you shall be exactly tied up in your question to character for truth and veracity. *Jackson v. Lewis*, 13 Johns. 504, says that this is the principal inquiry, and see *Gass v. Stinson*, 2 Sumn. 610, and hold that you shall not, with a view to impeach general credit, show the particular fact that the witness was a prostitute. The same thing was held in the late case of *Bakeman v. Rose*, 14 Wend. 105. That is all which the case decides, viz: that you shall not prove particulars. It does not hold that the reputation of being a public prostitute shall not enter into an impeaching witnesses' estimate of general character. There is a discrepancy between the statement of the case and opinion there, which might mislead. The question in the former appears to be one of reputation. The abstract of the case and the opinion of the late Chief Justice both regard the question as the same with that in *Jackson v. Lewis*, *supra*. I will merely add a case or two more. In *People v. Mather*, 4 Wend. 257, 21 Am. Dec. 122, Marcy, J., appears to prove the English form of putting this question as it has long stood in Philips, Starkie and Peake, etc., and as it has been, I presume, constantly put at the English Nisi Prius. In the late case of *Rex v. Bispham*, 4 Car. & P. 392, before Garrow, B., he put the question in this form: "You have known him three years. Have you such a knowledge of his general character and conduct, that you can conscientiously say that from what you know of him, it is impossible to place the least reliance on any statement he may make." See *Gass v. Stinson*, *supra*, and cases cited, that the question in chancery is the same in form as at law, on the English authorities. It is, therefore, by no means clear that the general inquiry as to the character for notorious lewdness, mentioned as admissible in *Rex v. Clarke*, 2 Stark. 241, may not, after all, be traced to the general ground. If such a latitude be allowed anywhere, it seems to be emphatically proper in a case of rape. Daggett, J., in *State v. De Wolf*, 8 Conn. 100, 20 Am. Dec. 90.

110, the absurdity of that distinction was acknowledged, and the two cases which established it were overruled. The court say: "When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases as in all.

The woman having denied that she had had connection with the individual accused of assaulting her, it was sought *ab aliunde* to prove that, at certain specified times and places before the time of the commission of the alleged offense, she had voluntarily had connection with the prisoner. It appears to me clear that such evidence was admissible. Now, it has been held over and over again that where evidence is denied by the prosecutrix with regard to acts of connection committed by her with persons other than the prisoner, she cannot be contradicted. The rejection of such evidence is founded on good common sense, not only because it would put cruel hardship on a prosecutrix, but also on the ground that the evidence does not go to the point in issue, that point being whether or not a criminal assault had been made upon her by the prisoner. To admit evidence of connection previously with persons other than the prisoner would be plainly contrary to the most elementary rules of evidence, but to reject evidence as to the particular person is another matter. Because not only does it render it most likely that she would or would not have consented, but it is evidence which goes to the very point in issue. *Reg. v. Riley*, 16 Cox, C. C. 199, 7 Am. Crim. Rep. 97.

§ 521. **Complaint of the Outrage may be Shown.**—In prosecutions for rape, it is not denied, and in fact may be said to be universally conceded, that the state may, on the direct examination of the prosecutrix, prove the bare fact that she made com-

plaint of the injury, and when and to whom, and she may be corroborated by the person to whom she complained as to the same fact. As to whether the details, or particular facts of the complaint, can be proved, there is some conflict of authority among the decisions outside of this state, some of the most respectable courts holding that such evidence is admissible to show the nature of the complaint, and the probability of its truth. *Benstine v. State*, 2 Lea, 169, 31 Am. Rep. 593; *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309; *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436.

The rule following what is believed to be the weight of authority both in England and America, is settled the other way. When the complaint does not constitute a part of the *res gestæ*, but is received only in corroboration of the prosecutrix's testimony, the general rule is, that the details or particulars cannot be introduced, in the first instance, by the state. This would exclude any statement made in the complaint pointing out the identity of the person accused, or explaining the injuries claimed to have been received during the alleged perpetration of the crime, or otherwise giving the minute circumstances of the event. *Griffin v. State*, 76 Ala. 29, and cases there cited; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366.

But there are two cases at least where, under the authorities, the details of such complaint may be proved: (1) They may be elicited, on cross-examination, by the defendant; and where this is done only in part, the state may then proceed to prove, on the rebutting examination, the whole complaint. (2) Where the testimony of the prosecutrix is sought to be impeached, by attempting to discredit her story, it is permissible, by way of corroboration, for the state to prove such details, and, according to many of the authorities, also to prove that she told the story the same way to others, confirmatory of her first statement. *Griffin v. State*, 76 Ala. 29; *Pleasant v. State*, 15 Ark. 624; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *State v. Laxton*, 78 N. C. 564.

In prosecutions for rape, it is very proper for the jury to be exceedingly cautious how they convict a defendant on the uncorroborated testimony of the prosecutrix, especially where there is evidence tending to impeach her credibility, for the experience of the courts in modern times has amply attested the assertion of

Lord Hale, that the charge of rape is "an accusation easy to make, and hard to be proved, and harder still to be defended by the party accused, though never so innocent." 1 Hale, P. C. 635. But there is no rule of law which forbids a jury to convict one charged with this crime, on the uncorroborated testimony of the prosecutrix, although she be impeached for ill-fame in chastity, or otherwise; provided they be satisfied, beyond a reasonable doubt, of the truth of her testimony. *Boddie v. State*, 52 Ala. 395; 2 Bishop, Crim. Proc. (3d ed.) 968. If this were not so, one of the most detestable and atrocious of all crimes known to the law might often go unpunished, as the perpetrators of this offense almost invariably seek to carry out their purpose when their victim is alone and unprotected. *Barnett v. State*, 83 Ala. 40.

"But the rule respecting the time that elapses before the prosecutrix complains will not apply where there is good reason for the delay, as that she was under the control or influenced by her ravisher." 3 Chitty, Crim. L. 812.

And to the same effect the law is laid down in 1 East, P. C. 435, 438, citing the case of *Rex v. Russen*, where the defendant was master of a charity school, and when the female assailed, one of his pupils, was deterred by his threats from making discovery of the outrage until three months after the offense was committed, and where the conviction was held good.

And in New York the court of appeals has laid down the same rule. *Higgins v. People*, 58 N. Y. 379; *Baccio v. People*, 41 N. Y. 266.

We may conclude therefore that the rule requiring immediate complaint is not inflexible. That if reasonable circumstances cause delay, the effect is simply for the jury; and their province as to that fact will not be invaded by the court. *State v. Byrne*, 47 Conn. 466; *State v. DeWolf*, 8 Conn. 99, 20 Am. Dec. 90; *Mallet v. People*, 3 Hawley, Am. Crim. Rep. 382, and cases cited in note.

It is a general rule that the evidence of a witness can never be corroborated or confirmed by proof that the witness stated the same facts testified to in court on some occasion when not under oath. Such statements, like all hearsay evidence, are excluded as unsatisfactory and incompetent. But there is an exception to the rule in case of rape. The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the

first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure, for the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply.

In 1 Hale's Pleas of the Crown, 632, it is said that "the complainant must make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned."

In 1 East's Pleas of the Crown, 445, it is said that the evidence of the complainant "is confirmed if she presently discovered the offense and made pursuit for the offender," and that "her evidence is discredited if she concealed the injury for any considerable time after she had opportunity to complain." And the same language is substantially embodied in 4 Blackstone's Commentaries, 214.

In *Baccio, v. People*, 41 N. Y. 265, the defendant was indicted for rape and upon the trial the prosecution was permitted to give evidence that the complainant disclosed the crime to her mother twenty-four days after its commission; and the conviction in that case was reversed on the ground that the mother of the complainant was permitted to testify in detail on her direct examination to the statements made to her by the complainant of the time and manner of the offense. Judge Woodruff, writing the opinion, said :

"I was first inclined to say that evidence of any complaint made so long after the alleged injury, and especially when forced from the daughter, by the mother, after her daughter had once declared that her injury was due to a fall, should not have been received at all from any person; the complaint was certainly not made recently after the alleged outrage. But in a case in which the fact of complaint is admissible, it is perhaps competent to explain the want of such early complaint, by facts which show that it was impracticable, or that it was prevented by circumstances consistent with the natural impulse to complain thereof, so far at least as to destroy the presumption of falsehood derivable from concealment on the part of the female."

In the course of his opinion the same learned judge said that

the rule admitting such declarations in case of rape is an exception to the general rule excluding declarations made out of court by a person who had been or might be examined as a witness, and is properly confined within narrow limits; and he suggested that the reason for the admission of such declarations is "that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed will make immediate complaint thereof to her mother, or other confidential friend, and inasmuch her failure to do so would be strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made."

In *Higgins v. People*, 58 N. Y. 377, the defendant was indicted for rape. In that case it appeared that the prosecutrix arrived in New York an entire stranger, and having lost her baggage she was inveigled into a basement on pretense of finding it, where she was outraged. Upon coming out into the street she met a woman who asked her what was the matter, also a policeman who took her to a station-house. To neither of these did she state the real offense; but it appeared that as soon after arriving at the station-house as her excitement would admit, she stated the facts to the police captain. Upon these facts defendant's counsel requested the court to charge that "if the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong, it is a circumstance against her, casting a great discredit on her testimony, and tends strongly to disprove the truth of the accusation." This the court refused to charge, and it was held, conceding the proposition to be entirely accurate, it was an abstract one, as there was no ground for saying that the disclosure was not sufficiently prompt, and that it was not error, therefore, to refuse so to charge.

Church, *Ch. J.*, writing the opinion, said: "The proposition (which the court was requested to charge) is, doubtless, substantially correct, although it is quite general and somewhat vague. Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear may sometimes excuse or justify a delay. There can be no iron rule on the

subject. The law expects and requires that it should be prompt; but there is, and can be, no particular time specified. The rule is founded upon the laws of human nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female."

In Connecticut a more liberal rule as to disclosures made by a prosecutrix has been adopted than prevails in some other states. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *State v. Byrne*, 47 Conn. 465.

There it may be proved, not only that she made disclosures of the crime, but the details of the crime as she disclosed them may also be proved. In the two cases cited the disclosures were made after a much longer time than in any other case which has come to our attention.

In Ohio, the immediateness of the complaint is essential to its admissibility. *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608. In *Johnson v. State*, 17 Ohio, 593, it is said: "There can be no doubt, that in a case of rape the declarations of the injured female, made immediately or soon after the injury inflicted are competent testimony, provided the female herself has first been examined; competent not for the purpose of proving the commission of the offense, but as corroborative of, or contradictory to her statements made in court. If these declarations are in accordance with the testimony given in court, they tend to strengthen and give effect to that testimony, if against it, the testimony is destroyed. If such testimony were to be entirely excluded when offered on the part of the prosecution, it would be extremely difficult to convict in any case. For, as a general rule, it would be dangerous to convict, unless immediate complaint was made by the female, to her friends or others."

The same doctrine has recently been announced in Michigan, *People v. Gage*, 62 Mich. 271, where Champlin, J., said: "It is contended that the testimony ought not to have been received because of the lapse of time after the outrage and the statement of the mother. The lapse of time occurring after the injury, and before complaint made, is not the test of admissibility of the evidence, but it may be considered as affecting its weight; and, when complaint is not made promptly, the delay calls for explanation before the court will admit it."

§ 522. **Caution as to the Admission of Uncorroborated Testimony.**—More than the testimony of the prosecutrix is re-

quired to convict. Sack, Inst. (2d ed.) No. 11, 767; Whart. Crim. Ev. (9th ed.) § 273; *State v. Wilson*, 91 Mo. 410; *People v. O'Sullivan*, 104 N. Y. 481; *Parker v. State*, 67 Md. 329; *Dunn v. State*, 45 Ohio St. 249. If there is no outcry and prosecutrix remains friendly with accused after offense, these facts raise a strong presumption of innocence on the part of the accused. *Barney v. People*, 22 Ill. 160. The same presumption arises where there is no injury to the clothing and prosecutrix concealed the wrong for several days. *State v. Cross*, 12 Iowa, 66, 79 Am. Dec. 519. No outcry is strong evidence against prosecutrix's story. *State v. Cone*, 46 N. C. 18; *Gifford v. People*, 87 Ill. 210; *Eyler v. State*, 71 Ind. 49; *Leoni v. State*, 44 Ala. 110; *Topolanck v. State*, 40 Tex. 160; *State v. Byrne*, 47 Conn. 465. Where defendant denies the rape prosecutrix must be corroborated. *Mathews v. State*, 19 Neb. 330; *Gazley v. State*, 17 Tex. App. 267; *People v. Tierney*, 67 Cal. 54; *Dickey v. State*, 21 Tex. App. 430; *Bailey v. Com.* 82 Va. 107; *Carney v. State*, 118 Ind. 525; *Hall v. People*, 47 Mich. 636; *State v. Cook*, 65 Iowa, 560; *Lawson v. State*, 17 Tex. App. 292. If there has been a want of promptness in making complaint or declarations the court should not admit evidence of complaint or declarations until delay has been satisfactorily excused or justified.

§ 523. **Utmost Resistance must be Shown.**—Of course, the phrase, "the utmost resistance," is a relative one; and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another. In one case a woman may be surprised at the onset, and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about and upon that she cannot struggle. But whatever the circumstances may be, there must be the greatest effort of which she is capable therein, to foil the pursuer and preserve the sanctity of her person. This is the extent of her ability. And see *People v. Bransby*, 32 N. Y. 525, 531, 540; *People v. Hulse*, 3 Hill, 309, 316, 317; *Rex v. Lloyd*, 7 Car. & P. 318; *Crosswell v. People*, 13 Mich. 427, 433, 87 Am. Dec. 774; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349.

In Iowa, it is held in one case, that it is not necessary to establish the non-consent or force by the outcry of the female, nor to show the fact of an actual struggle. It is to be observed of that

case, that the imbecility of mind of the female was shown, and that some force was used by the accused; and the case turned upon the lack of intelligence in the victim to give or withhold consent, or to prompt a vigorous resistance. *State v. Tarr*, 28 Iowa, 397.

The nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance. *Ledley v. State*, 4 Ind. 580; *Pomeroy v. State*, 94 Ind. 96; *Com. v. McDonald*, 110 Mass. 405; *Anderson v. State*, 104 Ind. 467; 2 Bishop, Crim. L. § 1122.

§ 524. **Presumption as to Infants.**—In Ohio it is held that “an infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it, but that presumption may be rebutted by proof that he has arrived at the age of puberty, and is capable of emission and consummating the crime.” *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 536. The same rule prevails in New York. *People v. Randolph*, 2 Park. Crim. Rep. 174. See also *Com. v. Green*, 2 Pick. 380; *Williams v. State*, 20 Fla. 777.

The rule doubtless is that on the trial of an indictment for rape proof of the fact that the prosecutrix made complaint recently after the commission of the offense is competent; while details given by her as to how the offense was committed, and by whom, are not competent as evidence in chief; that it is also competent to show the condition of the prosecutrix, mentally and otherwise, immediately after the offense in order that the jury may judge more accurately as to the credit that should be given to her testimony.

Mr. Russell, in his treatise on Crimes, after mentioning among the circumstances, bearing on the credibility of the female, the fact that she presently discovered the offense, says: “It is the usual course, in cases of rape, to ask the prosecutrix whether she made any complaint, and if so, to whom; and if she mentions a person to whom she made complaint, to call such person to prove *that fact*. But it has been the invariable practice not to permit either the prosecutrix or the person so called to state the particulars of the complaint during the examination in chief.

These several writers refer to the numerous cases in England, and in this country, in which, not without some conflict, however, the subject has been discussed.

Thus, in *Rex v. Clarke*, 2 Stark. 334, Holroyd, *J.*, held that the fact of her having made the complaint was evidence, as also was the description of her state and appearance at the time; but that the particulars of the complaint were not evidence of the truth of her statement.

In *Reg. v. Walker*, 2 Mood. & R. 212, it was held by Parke, *Baron*, that the female assaulted may be confirmed by proof, that she recently after the alleged outrage made a complaint, but that the particulars of what she said cannot be asked in chief of the confirming witness, though they may in cross-examination.

In *Reg. v. Megson*, 9 Car. & P. 428, evidence having been given of the appearance of the female on arrival at home early in the morning, immediately after the alleged outrage, and of her condition on examination by a surgeon on a subsequent day; and also, that as soon as she reached home in the morning, she made complaint of what had happened to her, and it was proposed to inquire "the terms of the complaint," it was excluded. In that as also in *Reg. v. Guttridge*, 9 Car. & P. 471, where evidence of her recent complaint was excluded, the injured female had not been examined as a witness. Thus showing that her declarations are not, *per se*, evidence against the party charged.

In *People v. McGee*, 1 Denio, 19, the supreme court of New York state approve and follow the decisions in the two cases last cited.

In *People v. Hulse*, 3 Hill, 316, Bronson, *J.*, after citing the admonitory remarks of Lord Hale on the ease with which the accusation may be made, and the difficulty of defending by the party charged, be he never so innocent adds: "Cases of this character do not call for any relaxation of the rules of evidence for the purpose of supporting the accusation. . . . There is much greater danger that injustice may be done to the defendant in cases of this kind, than there is in prosecutions of any other character."

In a case of this character, the omission of the prosecutrix to promptly make complaint of the wrong which she has suffered, may be taken as a circumstance against the credibility of her statements as a witness against the prisoner, unless delay in doing

so is reasonably excused. *Higgins v. People*, 58 N. Y. 377. It is, therefore, competent to prove by the witness to whom made, that she did not make such complaint. Such a proof is not, and cannot, be treated as any evidence of the fact so stated, but is admissible only on the question of her credibility, and therefore can be received only when she has testified as a witness. *People v. McGee*, 1 Denio, 19; *Baccio v. People*, 41 N. Y. 265. The cases are not uniform as to the extent of the inquiry which may be put to and answered by a witness to whom such complaint is made. The rule in some of the states permits a full statement in detail of the facts communicated by and embraced in the complaint to be given by the witness. It is such in Connecticut (*State v. De-Wolf*, 8 Conn. 153, 20 Am. Rep. 90; *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436); in Tennessee (*Phillips v. State*, 9 Humph. 246, 49 Am. Dec. 709; *Benstine v. State*, 2 Lea, 169, 31 Am. Rep. 593); and in Ohio. *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Ohio, 99, 51 Am. Dec. 444. The rule in England for many years has been more restrictive, and does not permit the admission, on the part of the prosecution, upon the trial, of the statement so made by the prosecutrix, to any extent further than that she made complaint of an outrage upon her person. The name of the persons who did it, or the place where done, as declared by her at the time of making such complaint, is not admissible, nor is any other than the general fact embraced within it; and such is the rule in some of the states. *Reg. v. Osborne*, 1 Car. & M. 621; *Reg. v. Megson*, 9 Car. & P. 420; *Rex v. Clarke*, 2 Stark. 241; *Reg. v. Walker*, 2 Mood. & R. 212; *Reg. v. Mercer*, 6 Jur. 243; *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366; *State v. Thompson*, 38 Ind. 39; *State v. Richards*, 33 Iowa, 420.

It is proper evidence in support of an indictment for rape that the injured party made complaint immediately after the occurrence. It is not admitted as evidence of the criminal act, but in support of direct evidence of such an act. *Baccio v. People*, 41 N. Y. 265.

These rules in regard to the crime of rape laid down by the old authors have been recognized by the courts down to the present time; and the fact that the complaining witness made early complaint of the offense charged has always been considered strong corroboration of her charge; and the fact that she made no complaint at the time, and delayed the prosecution, has always been

considered a suspicious circumstance against the prosecution. In this case, the complaining witness testified that as soon as the accused left her house she left the house and went to Mrs. Marston's, her nearest neighbor, and told her what had been done, and that when she met her husband, on the same day, she made complaint to him. *Rex v. Clarke*, 2 Stark. 241; *Reg. v. Osborne*, 1 Car. & M. 622; *Reg. v. Megson*, 9 Car. & P. 420; *State v. Niles*, 47 Vt. 82; *Baccio v. People*, 41 N. Y. 265; *Reg. v. Walker*, 2 Mood. & R. 212; *People v. McGee*, 1 Denio, 19; *People v. Hulse*, 3 Hill, 316; *People v. Mayes*, 66 Cal. 597; *People v. Tierney*, 67 Cal. 54; *State v. Richards*, 33 Iowa, 420; *State v. Clarke*, 69 Iowa, 294; *People v. Gage*, 62 Mich. 271. These cases all hold that it is proper for the prosecution to show that the complaining witness made complaint of the alleged ravishment, and that the person to whom the complaint was made may be called as a witness on the part of the state, and may testify that such complaint was in fact made; but the particulars of the statements made by the complainant witness cannot be given in evidence, except in a case where the person ravished is very young. There certainly was no error in permitting the husband of the prosecuting witness to testify that she made complaint to him of the outrage when she first saw him on the evening after the offense was claimed to have been committed; nor was there any error in permitting him and the medical witness to testify to the existence of the marks and bruises upon her person. There is no suspicion attached to the case of the state arising from delay in the prosecution. The injured party, in the language of the old law, made immediate "hue and cry," and had the defendant arrested within a few hours after the alleged crime was committed. *Hannon v. State*, 70 Wis. 448, 10 Crim. L. Mag. 421.

Touching the crime under discussion, Blackstone says: "The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: If the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she

concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned." 4 Bl. Com. 213.

These remarks are for the most part but a condensed statement from what had already been said by an earlier author. 1 Hale, P. C. 634, 635.

Wharton says: "In prosecutions for rape, where the party injured is a witness, it is material to show that she made complaint while it was yet recent." Whart. Crim. Ev. (9th ed.) § 273.

§ 525. **Evidence of Previous Offenses or Attempts.**—But where a prisoner is tried for a particular crime, it is always competent to show on the question of his guilt that he had made an attempt at some prior time, not too distant, to commit the same offense. Upon the trial of a prisoner for murder, it is competent to show that he had made previous threats or attempts to kill his victim. *People v. Jones*, 99 N. Y. 667. Upon the same principle, it must always be competent to show that one charged with rape had previously made an unsuccessful attempt to do so. *State v. Way*, 5 Neb. 287; Whart. Crim. Ev. 35, 46, 49; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *State v. Knapp*, 45 N. H. 156; *State v. Wallace*, 9 N. H. 515; *Strang v. People*, 24 Mich. 6; *State v. Marvin*, 35 N. H. 22; *Sharp v. State*, 15 Tex. App. 171; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Reg. v. Rear-den*, 4 Fost. & F. 76; *Com. v. Lahey*, 14 Gray, 92; *Reg. v. Jones*, 4 L. T. N. S. 154; *Reg. v. Chambers*, 3 Cox, C. C. 92; *Com. v. Merriam*, 14 Pick. 518; *Williams v. State*, 8 Humph. 585.

§ 526. **Consent Secured by Fraud.**—The plaintiff in error is a physician having a wife and four children. The prosecutrix is a single woman thirty years of age. The commission of the offense rests upon her testimony alone. Her evidence, briefly stated, is, that the plaintiff in error, while attending her in a professional capacity, told her that she had a disease of the womb, and that a physical examination was necessary; that she submitted with much reluctance; that he had carnal connection with her, on two occasions, while professing to be making such examination; that this occurred in the parlor of her brother's house, in the day time, while the wife of her brother was in an adjoining room; that she made no outcry; that she believed that while the plaintiff

in error was doing these acts, he was making a medical examination in the usual way, and that she made no revelation of these occurrences until after she had been told that she was pregnant.

No one, we think, would seriously contend that such a statement, made by a female of mature age, and possessing any intellectual capacity ought to be allowed to become the basis of a judicial action. The effort of the prosecution, therefore, was to show that the mental condition of the prosecutrix was such as to render her testimony credible. This effort failed.

The only testimony on this point come from Dr. Stickney, who had known her twenty years. He testified that "she is not an imbecile, but not a smart or strong minded girl."

Farther comment on the facts is unnecessary.

The court, among other points, charged the jury as follows: "As to the degree of force used in a case like this, where resistance is not made by reason of a representation leading the female to believe that sexual penetration of her body is necessary for the recovery from disease, the force used in ordinary sexual intercourse is sufficient to constitute a rape." An exception was taken to this part of the charge.

The prisoner's counsel requested the court to charge several propositions presenting the point, that the force requisite to constitute the crime of rape had not been proved, and also this proposition, namely: that "even if the defendant had accomplished his alleged purpose by fraud, without intending to use force, then such fraud does not constitute rape, unless the evidence shows that the defendant intended to use force, if the fraud failed;" but the court refused to modify the charge, and the prisoner's counsel excepted.

We are of opinion that the proposition, quoted from the charge, is erroneous. No authority has been cited sustaining such a proposition. The remark of Mr. Wharton in his treatise (Am. Crim. L. § 1144) cannot be regarded as having the sanction of his learning and ability. It rests upon no other foundation than a note to the reporter in *People v. Bartow*, 1 Wheel. Crim. Cas. 381, which states a mere rumor of a decision by *Ch. J. Thompson*. Loose statements of that kind are entitled to no consideration whatever. Principles contrary to those laid down by the court below have been frequently asserted. See authorities cited in *Roscoe, Crim. Ev.* (6th ed.) 278, 806. See also *People v. Bransby*, 32 N. Y. 528; *Walter v. People*, 50 Barb. 144, 2 Bishop, Crim. L. §§ 1078, 1080.

CHAPTER LIX.

INCEST.

§ 527. *The Term Defined.*

528. *Concurring Assent of both Parties Necessary.*

529. *Consanguinity may be Proved by Defendant.*

530. *Offense may be Committed with Illegitimate Daughter.*

531. *Previous Acts of Lasciviousness may be Shown.*

§ 527. **The Term Defined.**—The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. It is punished by fine and imprisonment, under the laws of the respective states. *Vide* 1 Smith's Laws of Pa. 26; Dane, Abr. Index, *h. t.*; Com. Dig. 23, 2, 68; *State v. Roswell*, 6 Conn. 446; 1 Penal Laws of China, §§ 2, 10; Swinb. Jud. Reg. part 2, p. 103, § 17; 1 Bouvier, Law Dict. 617.

§ 528. **Concurring Assent of both Parties Necessary.**—In an Oregon case (*State v. Jarvis*, 20 Or. 439), the prosecutrix testified that the incestuous intercourse commenced in 1884, when she was 16 years old, and continuing as often as twice a week and sometimes oftener and until April, 1889; that at no time did she willingly consent, but was compelled by force to submit; that at one time defendant pointed a pistol at her and said he would kill her if she refused; at another time he threatened her with an ax; and at another, with a board; that she did not complain to any one because defendant said he would shoot her if she told anybody about the matter. It was argued for the appellant that the crime of incest requires the concurring assent of both parties, and that under the facts in this case defendant was guilty of rape, if guilty of any crime, and could not be convicted of the crime of incest. The crime of incest was not indictable at common law, but is so only by statute. 4 Bl. Com. 64; Bishop, Statutory Crimes, § 728. To the statute alone, then, must be looked for a definition of the crime and for a solution of the question in the case.

In *People v. Jenness*, 5 Mich. 321, it is said by Christiancy, *J.*: "This offense (incest) can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concur-

rence of the one is as essential to the commission of the offense as that of the other; and as a general rule both must be guilty or neither."

In *Delany v. People*, 10 Mich. 241, the information was based on a statute, the language of which was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, every such person shall be punished," etc.; held that the offense was joint, and both parties must be guilty, or neither. In *DeGroat v. People*, 39 Mich. 124, under a statute, the language of which is the same import, it was held that conviction could not be had unless the act was by concurrent assent of both parties.

Cooley, *J.*, speaking for the court, said: "Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristic of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent assent of two." In *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691, the statute provided "if any step-mother and her step-son shall have sexual intercourse together," etc.; and it was held that the act must be joint, and one of the parties cannot be guilty unless the other is also, and the acquittal of one is a bar to the trial of the other. So in *State v. Thomas*, 53 Iowa, 214, under a statute which provided that "if any persons within the prohibited degrees . . . carnally know each other, they shall be deemed guilty of incest," it was held that the crimes of rape and incest cannot be committed by the same act; the consent of both parties to the connection being necessary to constitute the crime of incest under the statute. In *Yeoman v. State*, 21 Neb. 171, the statute provided that "persons within certain degrees, who shall commit adultery or fornication with each other, shall be punished," etc., it was held that one of the parties might be indicted alone, but the court said: "It is true that both must be guilty, that the intermarriage, cohabitation, adultery or fornication must be by a union of minds as well as of actions." In *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, it was held that where the evidence proves the crime of rape, the party cannot be convicted of the crime of incest. So in *People v. Harriden*, 1 Park. Crim. Rep. 344, it was held under a statute similar to ours, that when the illicit connection is accomplished by force, the defendant cannot be convicted of incest, but

only of rape. In *Noble v. State*, 22 Ohio St. 545, by way of argument, it is said: "The crime of incest is committed by two willing parties." A doctrine contrary to that laid down in the authorities before referred to, has been held in *Mercer v. State*, 17 Tex. App. 452, and *People v. Barnes* (Idaho) Jan. 25, 1886. The Texas case is based upon former decisions of the same court and one Michigan *nisi prius* case, which has been repudiated by the court of last resort of that state, as we have already seen. The Idaho case is not in point in the case before us. The statement of the law as given in 10 Am. & Eng. Enc. Law, 341, is not believed to be supported by the weight of authority. The only cases cited as authority for the statement are the Texas and Michigan *nisi prius* cases, above referred to, and *Norton v. State*, 106 Ind. 163. The decided weight of authority is that the crimes of rape, by forcible ravishment, and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties. Possibly if the assent of one party was induced by fraud or deception, the party perpetrating the fraud might be guilty of incest, while the innocent party would not, or one party might be ignorant of the relationship, while the other had full knowledge of it, and so other circumstances might arise under which one party would be guilty and the other innocent. *State v. Jarvis*, 20 Or. 437.

In this country there are several cases to the same effect. Thus, in *Cook v. State*, 11 Ga. 53, where the defendant was indicted for incestuous intercourse with his own daughter. In *Cayford's Case*, 7 Me. 57, against a married man for lewd and lascivious cohabitation; and in *Ham's Case*, 11 Me. 391, for adultery, it was held, that the marriage might be proved by the admissions of the defendant. *Cayford's Case* required the court to go no further than to say the evidence was admissible where the marriage was solemnized out of the state or country, and accordingly the court confined their decision to that point, though their reasoning went beyond it; but subsequently in *Ham's Case*, they decided that whether the marriage was within or without the state, made no difference. These cases are entitled to the more respect from the fact, that they appear to have been decided after careful consideration and study of the authorities. See also *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Forney v. Hallacher*, 8 Serg. & R. 159, 11 Am. Dec. 590.

§ 529. **Consanguinity may be Proved by Defendant.**—On the trial of an indictment for incest, charged to have been committed by a father with his daughter, the declarations of the defendant are competent evidence upon the question of consanguinity. *People v. Harriden*, 1 Park. Crim. Rep. 344.

§ 530. **Offense may be Committed with Illegitimate Daughter.**—The evidence in the case cited below was claimed to be insufficient, but it fairly established the prisoner's guilt, and fully justified the verdict of the jury. If some of it was open to objection, at least no objection was made, and the inference of the defendant's guilt was an easy deduction from the proof. The principal ground of defense was asserted, that the victim of his lust, although his own daughter, was illegitimate, and so, whatever his depravity, it was not the crime of incest. He seduced that daughter's mother, abandoned her and the child for some years; then returning, took the daughter, just grown into womanhood, for his bookkeeper, as he said; seduced her in turn; and now pleads her illegitimate birth, the disgrace which she inherited from her cradle and inherited from him, as a defense to the charge of which he stands convicted. The law draws no such distinction. If it did we should be ashamed of it; for the offense, although committed with a daughter born out of wedlock, is not by that fact mitigated or condoned. She stood related to him by consanguinity within the forbidden degrees. That she had no inheritable blood for the purposes of descent and distribution does not alter the actual and natural relation.

"But the New York statutes leave no room for any reasonable doubt. The N. Y. Penal Code, § 302, enacts that 'persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall, upon conviction, be punished,' etc. This enactment is taken from the Revised Statutes (pt. 4, chap. 1, title 5, art. 2, § 12), and its reference is to the provision as to marriage. Pt. 2, chap. 8, title 1, art. 1, § 3. That declares marriages between parents and children incestuous and void, and specially includes illegitimate as well as legitimate children. Since, therefore, the consanguinity between father and daughter, although the latter be illegitimate, is by law declared to make their marriage incestuous and void, the provision of the penal code applies

to the same relation and described the crime of incest. Beyond its utter want of merit the defense has no foundation in the law." *People v. Lake*, 110 N. Y. 61.

§ 531. **Previous Acts of Lasciviousness may be Shown.**—The able opinion of Elliott, *Ch. J.*, in *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733, is as follows: "The indictment charges the appellees with having committed the crime of incest on the 6th day of March, 1882, and the state introduced evidence of incestuous intercourse on that day. After the introduction of this evidence the state offers to prove that prior to that time acts of indecent familiarity took place between the appellees, and that they had been guilty of sexual intercourse. At the time the evidence was offered, the prosecuting attorney stated to the court that the purpose in offering it was not to prove distinct and substantive offenses, but to prove lascivious and improper conduct between the defendants, prior to March 6, 1882. The court excluded the evidence, and that ruling is properly presented for our consideration.

The purpose for which the evidence was offered having been stated to the trial court, the inference that it was offered generally, and without any limitation as to the object of the prosecutor in offering it, is fully rebutted. The question for our decision is therefore whether it was competent for the purpose for which the state informed the court it was offered.

In *Lovell v. State*, 12 Ind. 18, it was held that evidence of acts of sexual intercourse subsequent to the time laid in the indictment and identified by the evidence introduced by the state, was incompetent, and it is confidently asserted that the decision in that case governs the present. But the cases are very different. Previous acts of lascivious familiarity would tend strongly to show the commission of the specific offense charged by the state, for it is impossible to doubt that evidence of such a character tends to make it probable that the parties did commit the specific offense charged. Such evidence goes in proof of the main offense, because it is evidence of the probability of its perpetration. Where the acts precede the offense, they constitute the foundation of an antecedent probability, but where they follow the main offense their force and effect are materially different. It is one thing to affirm that evidence of prior incestuous intercourse is competent, and another thing to affirm that evidence of subsequent sexual

intercourse is not competent; it is therefore not difficult to discriminate between the two cases.

It is a rule of elementary logic, as well as of rudimentary law, that evidence, which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous. It cannot be doubted that it is competent to show the previous intimacy between the persons charged with the crime of incest, their behavior toward each other, and their acts of impropriety and indecency. If it be proper to show acts of indecent and lascivious character, then surely it must be proper to show the act to which all such indecent and lascivious acts lead, and in which they will often culminate. It cannot be held, upon any principle of law or logic, that the state may show acts of improper intimacy up to the very act of sexual intercourse, and then must stop, although the sexual intercourse is but the usual result of the previous lascivious conduct. If the course of conduct tends to show that the incestuous intercourse charged in the indictment did take place, then surely the culminating act of sexual commerce must be evidence of a convincing character. It would be a singular rule that would admit evidence of lascivious conduct, and yet exclude evidence of the act, which of all the series supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the state might show previous lascivious conduct, but must not show an act of sexual intercourse, we should have the singular anomaly of a legal rule rejecting evidence simply because of its strength and importance. The usual rule of common sense, as of law, is, that the more material the evidence and the stronger its probative force, the greater the reason for holding it to be competent.

The intercourse between the sexes which constitutes the prime element in the offenses of adultery, fornication, incest and seduction, can only take place by the concurrence of two persons of opposite sexes, and the previous lascivious conduct of the parties is evidence of their disposition to indulge their lustful passions. The probability that a woman will yield to the embraces of a man to whom she has before submitted, or to whom she has for a long

time allowed improper familiarities, is much stronger than if it appear that no intimacy had existed between the parties, and the woman's conduct has always been modest and discreet. The disposition of the parties involved in the crime becomes an element of importance, and the disposition of the woman is shown by her conduct toward the man with whom she joins in violating the law. It is but natural to infer that a woman whose conduct has been immodest and licentious will be more likely to sin than one whose conduct has been modest and discreet. A truth recognized by the ordinary sense and experience of mankind was well expressed when it was said: "You will more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia."

The general rule undoubtedly is, that one crime cannot be proved in order to establish another independent crime, but this rule does not apply to cases where the chief element of the offense consists in illicit intercourse between the sexes. The decisions all agree that the sexes are not within the general rule. In the case of *People v. Jenness*, 5 Mich. 305, it was held that evidence of other acts of sexual intercourse was competent in prosecutions for incest. The case was fully argued, and the opinion is an able one. We quote from it the following: "Previous familiarities, not amounting to actual intercourse, but tending in that direction, must have a strong bearing in all cases of this kind; and we can discover no just principle on which they could have been excluded, without setting at defiance the common sense of mankind. Such evidence was given in this case by the father and mother of the girl, without objection from the defendant; and if such familiarities may be shown because they tend to prove actual intercourse, or to corroborate other evidence of such intercourse, upon what principle can previous actual intercourse be rejected, when offered for the same purpose? It is the principal and most important act of familiarity, to which the others only tended."

The general rule which governs the class of cases to which the present belongs is thus stated in *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182: "In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as inde-

pendent testimony, and if treated as an offense, would be barred by the statute of limitations." This statement of the rule is substantially borrowed from the text-writers. 2 Greenl. Ev. § 47; Whart. Crim. Ev. § 35. In discussing the general subject, the supreme court of Massachusetts said: "The intent and disposition of the parties toward each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true, that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact. An adulterous disposition existing in two persons toward each other is commonly of gradual development; it must have some duration and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties." *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110. The court from whose opinion we have quoted formerly held a different doctrine, and Mr. Bishop, in the course of a sharp criticism upon that holding, said: "But strangely enough, the Massachusetts court further held, on an indictment for adultery, that if the anterior familiarities extend so far, or are of such character as to show adultery actually committed on this previous occasion, the evidence of them—that is, of the previous adultery—is not admissible; according to which doctrine, if the evidence is a little weak, yet tending remotely to establish the crime, it may be submitted to the jury; but if it is a little stronger and tends more clearly to the same result, it must be excluded." Bishop, Statutory Crimes, § 680.

In *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124, very many authorities are reviewed, and it was held, in an opinion of much force, that evidence of former acts of sexual intercourse is admissible. Among the latter cases declaring this general doctrine are *State v. Pippin*, 88 N. C. 646, and *State v. Kemp*, 87 N. C. 538.

A wife is competent to testify against her husband in all jurisdic-

tions when by statutory provision she is allowed to give evidence against her husband in prosecutions for crimes committed by him against her. Incest has been held to be a crime against her. *State v. Chambers* (Iowa) Jan. 17, 1893, 47 Alb. L. J. 163.

CHAPTER LX.

ADULTERY.

§ 532. *The Term Defined.*

533. *Elements of the Crime.*

534. *Presumptive Evidence may be Sufficient.*

535. *Positive Proof never Required.*

536. *Views of Lord Stowell on the Subject.*

537. *Prior Offenses between the Parties may be Shown.*

538. *Admissions of Marriage Competent.*

539. *Adulterous Disposition may be Shown.*

540. *Birth of Child as Evidence of.*

541. *Reputation for Chastity may be Shown.*

§ 532. **The Term Defined.**—This is the unlawful and voluntary sexual intercourse of two persons of opposite sexes, one of whom is married. It is not an offense at common law, nor by statute in England, and is a statutory offense in only a few of the United States.

Either party may be tried alone, and it is not essential to show that both had a guilty intent.

On a charge of “open and notorious adultery” the public and habitual violation of the law must be shown. “Living in adultery” means more than a single act of adulterous intercourse.

Rape may be also adultery. Browne, *Crim. L.* 31, citing *Montana v. Whitcomb*, 1 Mont. 359, 25 Am. Rep. 740, 26 Am. Rep. 33, note; *Com. v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *State v. Crowner*, 56 Mo. 147; *State v. Cutshall*, 109 N. C. 764; *Smith v. State*, 39 Ala. 554.

§ 533. **Elements of the Crime.**—The elements of the crime are, 1st, that there shall be an unlawful carnal connection; 2d, that the guilty party shall at the time be married; 3d, that he or she shall willingly commit the offense; for a woman who has been ravished against her will is not guilty of adultery. 3 Domat, *Supp. du Droit Public*, title 10, note 13; 1 Bouvier, *Law Dict.* 76.

§ 534. **Presumptive Evidence may be Sufficient.**—Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only

by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. Evidence simply showing full and frequent opportunity for illicit, carnal intercourse, is not alone sufficient to found an inference that the criminal act was committed. General cohabitation alone, *i. e.*, the simple living or being together all or most of the time in the same household, apart from suspicious circumstances characterizing it, is not sufficient to warrant an inference of adultery; there must be some accompanying circumstances fitted fairly to induce a belief that it was not for a proper purpose. *Pollock v. Pollock*, 71 N. Y. 137.

§ 535. **Positive Proof never Required.**—In almost every case of adultery, the fact is inferred from circumstances that lead to it by fair inferences as a necessary conclusion. Positive proof of the fact is not required, and from the nature of the offense, not easily made. Circumstances that lead a rational and just man to a conclusion of guilt beyond a reasonable doubt, are sufficient to authorize a conviction. "A married man going into a known brothel raises a suspicion of adultery, to be rebutted only by the best evidence. His going there, and remaining alone for some time in a room with a common prostitute, is sufficient proof of the crime. The circumstance of a woman going to such a place with a man furnishes proof of adultery." 2 Greenl. Ev. p. 34, § 44. The same author, in page 32, section 41, states that the rule has been elsewhere more briefly stated, to require that these be such proximate circumstances proven, as by former decisions, or in their own nature and tendency, satisfy the legal judgment of the court that the criminal act has been committed; and, therefore, it has been held that general cohabitation excluded the necessity of proof of particular facts. Ordinarily, it is not necessary to prove the act to have been committed at any particular or certain time or place. It will be sufficient if the circumstances are such as to lead the court, proceeding with every necessary caution, to this conclusion, which it has often drawn between persons living in the same house, though not seen in the same bed, or in any equivocal situation. "The adulterous disposition of the parties being once established, the crime may be inferred from their afterward being discovered together in the bedchamber, under circumstances authorizing such inference." The proof made in this case was not positive proof of the fact,

but only of such facts as from which the guilt may be inferred. Being in bed together but once raises a presumption of guilt, but the guilt might possibly be disproved by a proper explanation of the circumstances; but being in bed together at various and different times cannot be satisfactorily explained consistently with innocence, and tends to satisfy the mind of the guilt of the accused beyond a reasonable doubt. From the nature of the charge, and the evidence reasonably to be expected to sustain it, latitude in the investigation must be allowed. *Baker v. United States*, 1 Pinney, 641.

Adultery may be established by the evidence of parties who saw the act committed, or by proof of facts from which intercourse may be inferred. On account of the secret character of the offense, the former, direct proof, cannot be expected; proof that the parties were seen in the same bed, or occupied at night the same room in which there was but one bed, or lived together as if husband and wife (but not mere fact of a marriage ceremony between them) raises an almost irrebuttable presumption of their intercourse; so a wife's adultery may be proved by the fact of the birth of a child without access of her husband, or a husband's by his having a venereal disease too long after marriage to have been caused before. The circumstances from which adultery may be inferred must be such as to satisfy a reasonable and just man beyond reasonable doubt. Adultery may be proved by a preponderance of evidence; all doubt need not be excluded, though of course it is not established by facts which are equally consistent with innocence. The proof must be clear, positive, satisfactory. Two things should be proved: (1) a criminal attachment between the parties, and a mutual intention to indulge in intercourse; and (2) opportunities to so indulge. If the intention of both is proved, and the opportunities are ample, adultery will be presumed. Opportunities alone are not enough, nor are opportunities with mere suspicious circumstances; nor is mere scandal, or suspicion; but a combination of suspicious facts may lead to an inference of guilt when separately they would not.

Stewart, Marriage & Div. § 246, citing the following American cases: *Evans v. Evans*, 41 Cal. 103, 108; *Larrison v. Larrison*, 20 N. J. Eq. 100, 101; *Burchet v. Burchet*, Wright (Ohio) 161; *Pollock v. Pollock*, 71 N. Y. 137, 141; *Mosser v. Mosser*, 29 Ala. 313, 317; *Inskeep v. Inskeep*, 5 Iowa, 204, 208; *Freeman v.*

Freeman, 31 Wis. 235, 240; *Van Epps v. Van Epps*, 6 Barb. 320, 323; *State v. Way*, 6 Vt. 311; *Scroggins v. Scroggins*, Wright (Ohio) 212; *Langstaff v. Langstaff*, Wright (Ohio) 148, 149; *Masten v. Masten*, 15 N. H. 159, 161; *Reemie v. Reemie*, 4 Mass. 586; *Wilson v. Wilson*, Wright (Ohio) 128, 129; *Com. v. Shepherd*, 6 Binn. 283, 286, 6 Am. Dec. 449; *Johnson v. Johnson*, 14 Wend. 637, 642; *North v. North*, 5 Mass. 320; *Mount v. Mount*, 15 N. J. Eq. 162, 163, 82 Am. Dec. 276; *Cook v. Cook*, 32 N. J. Eq. 475, 477, 478; *Thayer v. Thayer*, 101 Mass. 111, 113, 114, 100 Am. Dec. 110; *Berckmans v. Berckmans*, 16 N. J. Eq. 122, 140; *Mulock v. Mulock*, 1 Edw. Ch. 14; *Ferguson v. Ferguson*, 3 Sandf. 307; *Carter v. Carter*, 62 Ill. 439, 449; *Smith v. Smith*, 5 Or. 186-188; *Chestnut v. Chestnut*, 88 Ill. 548, 551; *Whitenack v. Whitenack*, 36 N. J. Eq. 474, 477; *Freeman v. Freeman*, 31 Wis. 235, 241; *Jeter v. Jeter*, 36 Ala. 391; *Clear v. Reasor*, 29 Iowa, 327; *Mehle v. Lapeyrollerie*, 16 La. Ann. 4; *Dailey v. Dailey*, Wright (Ohio) 514, 517; *State v. Waller*, 80 N. C. 401, 402; *Blake v. Blake*, 70 Ill. 618, 625; *Hunn v. Hunn*, 1 Thomp. & C. 499, 501; *Black v. Black*, 30 N. J. Eq. 228, 230; *Platt v. Platt*, 5 Daly, 295, 296; *Derby v. Derby*, 21 N. J. Eq. 36, 60; *McClung v. McClung*, 40 Mich. 493; *Cooper v. Cooper*, 10 La. 249, 252; *Mayer v. Mayer*, 21 N. J. Eq. 246, 248; *Johnston v. Johnston*, Wright (Ohio) 454; *Smelser v. State*, 31 Tex. 95, 96; *Soper v. Soper*, 29 Mich. 305, 306; *Overstreet v. State*, 3 How. (Miss.) 328, 329; *Marble v. Marble*, 36 Mich. 386, 388; *State v. Crowley*, 13 Ala. 172, 174.

§ 536. **Views of Lord Stowell on the Subject.**—Lord Stowell in a case still quoted with entire approbation says :

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely, indeed, that the parties are surprised in the direct act of adultery. In every case, almost, the fact is inferred from circumstances, that lead to it, by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion, cannot be laid down universally, though many of them, of a more obvious nature, and of more frequent occurrence, are to be found in the ancient books; at the same time, it is impossible to indicate

them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject, is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances, that are equally capable of two interpretations,—neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtilties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and the legal interpretation must be the same.” *Loveden v. Loveden*, 2 Hagg. Consist. Rep. 2, 3.

§ 537. Prior Offenses between the Parties may be Shown.—

In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuous or illicit relations, even subsequent to, the act specifically under trial. Prior sexual attempts on the same woman are admissible, under the same limitations, on a trial of rape. Whart. Crim. Rep. § 35, citing *State v. Wallace*, 9 N. H. 518; *State v. Potter*, 52 Vt. 33; *Com. v. Horton*, 2 Gray, 354; *Com. v. Lahey*, 14 Gray, 91; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 284; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v. Bowers*, 121 Mass. 45; *People v. Jenness*, 5 Mich. 305; *Searls v. People*, 13 Ill. 597; *Lovell v. State*, 12 Ind. 18; *State v. Kemp*, 87 N. C. 538; *State v. Pippin*, 88 N. C. 646; *Lawson v. State*, 20 Ala. 66, 56 Am. Dec. 182; *Richardson v. State*, 34 Tex. 142; *McClung v. McClung*, 40 Mich. 493; *Boddy v. Boddy*, 30 L. J. Mat. 23; *State v. Witham*, 72 Me. 531; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *State v. Way*, 5 Neb. 283; *Pollock v. Pollock*, 71 N. Y. 137; *State v. Waller*, 80 N. C. 401.

§ 538. **Admissions of Marriage Competent.**—Where a man is on trial for adultery, the allegation of the indictment that he is a married man may be proved by evidence of his own admissions to that effect. Upon this question there is some conflict of authority. In New York (*People v. Humphrey*, 7 Johns. 314) and in Connecticut (*State v. Roswell*, 6 Conn. 446) upon criminal charges involving the same point, it has been held that the marriage cannot be so proved. In Massachusetts, in an indictment against two persons for lascivious cohabitation, one of them being a married woman, it was held that her admission, twelve years before, followed by cohabitation and the birth of children, was insufficient evidence of the marriage (*Com. v. Littlejohn*, 15 Mass. 163) and according to a citation in *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410, of a case to which we have not had access, a similar decision has been made in one other state.

Of these cases, those which we have examined, in so far as they rest upon authority, rest mainly upon the authority of *Morris v. Miller*, 4 Burr. 2057. This was an action for criminal conversation, in which the evidence that the woman alleged to have been debauched was the plaintiff's wife, was the declaration of the defendant to his landlord that she was the plaintiff's wife, and that he had committed adultery with her. The opinion of the court was delivered by Lord Mansfield, who said: "We are all clearly of the opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation and reputation are not sufficient to maintain this action." And he also said: "In prosecutions for bigamy, a marriage in fact must be proved."

§ 539. **Adulterous Disposition may be Shown.**—In proof of an unlawful sexual intercourse, the adulterous disposition of the parties at the time may be shown. To this end, the antecedent and subsequent conduct and declarations of the parties, if it has a tendency to prove the fact, is admissible. It is a matter of common observation, that a criminal intimacy, is usually of gradual development and when established is likely to continue between the parties. The act itself is the strongest evidence of the existence of the disposition; and it has been recently held that, for the purpose of proving it, an act of adultery at another time may be shown. *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110. It has long been held that prior acts of familiarity were

admissible to render it not improbable that the act might have occurred. *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420.

The only limit to this description of evidence is, that it must be sufficiently near in point of time, and sufficiently significant in character, to afford an inference of the moral condition to be proved. And this must be fixed to a greater extent by the discretion of the judge who tries the case. *Beers v. Jackman*, 103 Mass. 192.

"The letters of the respondent to the complainant which were admitted in evidence to show a suspicious intimacy between them which was necessarily the result of their previous acquaintance and relations; they contain expressions which could hardly be used between persons whose relations were innocent, and which fairly lead to the inference that the parties had been guilty of criminal intercourse. They were therefore admissible, within the discretion of the presiding judge." *Sullivan v. Hurley*, 147 Mass. 387.

There has been some difference of opinion as to the extent to which evidence of improper familiarities, other than that charged in the indictment is admissible. On the one hand, it has been said that in all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and if treated as an offense, would be barred by the statute of limitations. In point of fact, as evidence of adultery is almost always circumstantial, and as even when it is direct, corroborative evidence is admissible to support it, it is difficult to see how evidence of prior improper familiarities can be rejected. On the other hand, evidence of improper conduct by the defendant, with other parties than those charged in the indictment, is clearly inadmissible, and evidence of guilt with the same party subsequent to the finding of the indictment is inadmissible unless to corroborate facts proved to have taken place before. And it is plain that evidence of a propensity to commit the particular offense is inadmissible. Suspicions of the wife, and rumors in the neighborhood, are both inadmissible. *Whart. Am. Crim. L.* § 2653.

§ 540. **Birth of Child as Evidence of.**—Adultery of the wife may be proved by the birth of a child, and non-access of the hus-

band, he being out of the realm; and if adultery is alleged to have been continued, for many years, and with divers particular individuals, it is sufficient to prove a few of the facts, with identity of her person. Adultery of the husband, on the other hand, may be proved by habits of adulterous intercourse, and by the birth, maintenance, and acknowledgment of a child. 2 Greenl. Ev. § 44, citing *Richardson v. Richardson*, 1 Hagg. Eccl. Rep. 6; *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. Rep. 777, *note*; *Astley v. Astley*, 1 Hagg. Eccl. Rep. 719, 720; *Loveden v. Loveden*, 2 Hagg. Consist. Rep. 2, 4; *Kenrick v. Kenrick*, 4 Hagg. Eccl. Rep. 114, 124, 132, *Eliot v. Eliot*, cited in 1 Hagg. Consist. Rep. 302; *Durant v. Durant*, 1 Hagg. Eccl. Rep. 767; Bishop, Marriage & Div. § 427; *et seq.*

§ 541. **Reputation for Chastity may be Shown.**—In adultery, the chastity of a woman previous to the time of the commission of the alleged offense is not necessarily in issue, and evidence of previous acts of sexual intercourse with a man named (not the accused) is not admissible. *People v. Knapp*, 42 Mich. 267, 36 Am. Rep. 438. But evidence of other acts of adultery between the parties, commencing about the time of the commission of the alleged offense, is admissible. *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *State v. Witham*, 72 Me. 531. And so is evidence tending to show subsequent illicit intercourse between them. *Baker v. United States*, 1 Pinney, 641; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346. And evidence of the reputation for chastity, of the woman with whom the offense is alleged to have been committed is admissible. *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378; *People v. Brewer*, 27 Mich. 134, *note*.

The presumptions of law should be in accordance with the general fact; and whenever it shall be true of any country, that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately in our own country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it. *Crozier v. People*, 1 Park. Crim. Rep. 457; *People v. Kenyon*, 5 Park. Crim. Rep. 286; *Kenyon v. People*, 26 N. Y. 204, 84 Am. Dec. 177; *Andre v. State*, 5 Iowa, 398, 68 Am. Dec. 708; *People v. Millspaugh*, 11 Mich. 278. The case of *West v. State*, 1 Wis. 217, which seems to hold otherwise, was decided upon the phrase-

ology of the Wisconsin statute, which was thought to make the "previous chaste character" of the person seduced an ingredient in the offense, to be made out by proofs. The Michigan statute is very simple, and merely provides that, "if any man shall seduce and debauch an unmarried woman he shall be punished," etc. Comp. L. 1871, § 7697; *People v. Brewer*, 27 Mich. 134.

A person's character for chastity, when it is relevant, is not shielded from inquiry. It is a disagreeable subject of investigation, but the law makes no discrimination between subjects that are agreeable and those that are disagreeable. *Wood v. Gale*, 10 N. H. 247, 34 Am. Dec. 150. Sexual crimes are not excepted, as a peculiar class, from the operation of the general rule that admits relevant evidence. On an indictment for adultery, evidence of previous improper familiarities is competent. *State v. Wallace*, 9 N. H. 515; *State v. Marvin*, 35 N. H. 22; *Com. v. Merriam*, 14 Pick. 518, 25 Am. Dec. 420; *Com. v. Lahey*, 14 Gray, 91. In *Com. v. Horton*, 2 Gray, 354, and *Com. v. Thrasher*, 11 Gray, 450, it was held that although improper familiarities were competent, proof of actual adultery (other than that charged) committed by the same parties with each other was incompetent, but in *Thayer v. Thayer*, 101 Mass. 111, 113, 114, 100 Am. Dec. 110, the absurdity of that distinction was acknowledged, and the two cases which established it were overruled. The court says: "When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend and ordinarily do extend over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases as in all other investigations of fact. . . . By the application of the rule laid down in these cases (*Com. v. Horton*, 2 Gray, 354, and *Com. v. Thrasher*, 11 Gray, 450) evidence tending to establish an independent crime is to be rejected, although all

acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* cannot be shown by stronger evidence than the criminal act itself." *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

CHAPTER LXI.

BASTARDY.

- § 542. *The Term "Bastard" Defined.*
- 543. *Rule as to Children Born in Wedlock.*
- 544. *Unchaste Conduct of the Mother may be Shown.*
- 545. *Evidence of "Non-access" is Competent.*
- 546. *Mother of Bastard may Prove Illicit Intercourse.*
- 547. *When Presumption of Legitimacy will Govern.*
- 548. *Resemblance as a Test of Parentage.*
- 549. *Charge may be Sustained by Preponderance of Testimony.*

§ 542. **The Term "Bastard" Defined.**—By the statutes of New York, a child is deemed a bastard who is begotten and born out of lawful matrimony; or while the husband of its mother continued absent out of the state, for one whole year previous to the birth of the child, separate from its mother, and leaving her during that time continuing and residing in the state; or during the separation of its mother from her husband, pursuant to a decree of any court of competent authority. 1 Rev. Stat. part 1, chap. 20, title 6, § 1; 1 Stat. at L. 595.

§ 543. **Rule as to Children Born in Wedlock.**—In some others of the American states, as in Pennsylvania, Virginia and North Carolina, a child born during marriage may be proved to be a bastard—first, by evidence of the husband's inability; second, by proof of the non-access of the husband to his wife; third, by proof that the child was born out of due time; or, fourth, by proof that the child was born during the wife's open cohabitation with another man, and such child was considered illegitimate by the family. *Com. v. Stricker*, 1 Browne, App. 47; *Com. v. Wentz*, 1 Ashm. 269; *Statè v. Pettaway*, 10 N. C. 623; *Bowles v. Bingham*, 2 Munf. 442, 5 Am. Dec. 497.

As a general thing, it would seem that the law recognizes a child as legitimate, begotten before but born after marriage, on the ground that a man marrying a woman in an advanced state of pregnancy thereby admits the child afterward born to be his own, and in some states this is conclusive upon the question of legitimacy, while in others it is not. But in no case is it regarded as

conclusive that a child begotten in lawful wedlock is legitimate. The presumption of law is in favor of legitimacy in such cases, but as a general rule, such presumption may be rebutted by evidence. *Morris v. Davies*, 3 Car. & P. 215; *Reg. v. Mansfield*, 1 Q. B. 618; *Stegall v. Stegall*, 2 Brock, 256.

By the statutes of Maine, Vermont, Massachusetts, Connecticut, Ohio, Illinois, Indiana, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky and Missouri, and possibly some other states, it is provided, that when the parents of an illegitimate child intermarry after the birth of the child, and the father treats it as a legitimate child, the child shall thereby be adopted as such, and shall be deemed for all purposes legitimate from the time of its birth. *Vide* statutes of the several states. This is the law in France and in most other European nations, and efforts have been made to get such a provision into the code of New York. There would seem to be justice and mercy in the rule, and it will probably soon be the law in all the American states. Tyler, *Infancy & Coverture*, 232.

§ 544. Unchaste Conduct of the Mother may be Shown.—

In a case of this kind, where the only question is that of paternity, it should always be allowable to show unchaste conduct with a man other than the defendant, and especially if the circumstances are such as not to preclude the possibility that the other was the father of the child. *State v. Carver*, 65 Iowa, 53.

§ 545. Evidence of "Non-Access" Competent.—The ancient rule of the common law was, that the husband must be presumed to be the father, if he was within the realm, during any part of the time, within the extreme limits of the period allowed for gestation. This rule has long since been repudiated by the courts, as not consistent either with reason or common sense. For other evidence of the non-access of the husband, is frequently as strong and satisfactory to show the actual impossibility that the husband could have been the father of the child. Nor is it necessary that the evidence should be such as to render it impossible that sexual intercourse should have taken place between the husband and wife. It is sufficient if it proves, beyond a reasonable doubt, that no such intercourse did take place. *Van Aernam v. Van Aernam*, 1 Barb. Ch. 377.

§ 546. Mother of Bastard may Prove Illicit Intercourse.

The mother of the alleged bastard was a married woman, whose husband was living at the time of the alleged illicit intercourse

and the birth of the child. And while she is, from the necessity of the case, a competent witness to prove the illicit intercourse, and who is in fact the father of the child, she is not competent as a witness to establish the non-access of the husband; nor his absence from the state; nor any fact which may be proved by other testimony. This seems to be the well settled rule. 2 Stark. Ev. 404; Phil. Ev. 87; Greenl. Ev. 345; Cowen's & Hill's Notes, 153, 1555, and cases there cited. Lord Mansfield held that it was a rule founded in decency, morality and policy, that parties should not be permitted to say after marriage that they had no connection; while Lord Hardwicke placed the incompetency of the wife on the ground of the interest of the husband, in charging another with the support of the child. *People v. Ontario Poor Overseers*, 15 Barb. 292.

The declarations or accusations of the mother in such cases have never been considered by our courts as independent facts showing the fatherhood of the child, but as corroborative only of her testimony in court to the same effect. *Booth v. Hart*, 43 Conn. 480; *Robbins v. Smith*, 47 Conn. 182. This kind of corroboration was at first required by statute where the woman was the prosecutrix. For nearly a century and a half the woman was allowed to testify under oath, while the privilege was denied to the reputed father. But at the same time and for his security against a possibly false oath, the statute, in addition to the oath of the mother, required constancy in her accusation and that she should be put to discovery at the time of travail. *Chaplin v. Hartshorne*, 6 Conn. 44. This was regarded as a condition precedent to a recovery until the law allowed all parties in interest in all cases to testify. The statute still retains essentially the same provisions as to corroboration, but it is now not a condition indispensable to a recovery, but can be used to make a prima facie case, and to throw the burden of exculpation on the defendant. But whether the prosecutrix rests her case on preponderance of proof or avails herself of the provision for a prima facie case, her constancy of accusation is still regarded as confirmatory only of her testimony. We readily concede however that it is a most natural and effective corroboration. We may adopt the statement made in the brief for the defendant, and which is used to support the argument we are considering, "that as matter of fact the female, when her pregnancy becomes apparent to her friends and

acquaintances (and apparent it must become) will be called upon by everybody to name the father." We may even go further and concede that her declarations in some circumstances are in some sense illustrative of her condition and conduct, and yet we fail to see any analogy between such declarations and those now in question, made by one not accused at all by the prosecutrix, but only by the defendant for his own exculpation. *Benton v. Starr*, 58 Conn. 285.

The rule undoubtedly is, that a married woman cannot, as a witness, bastardize her offspring. It is against public policy, and would tend to the dissolution of marriages, and break up the peace of families. The very idea is unnatural. The statute only provides that after the bastardy is established, she may designate the father, *ex necessitate*; and such was the common law. *People v. Ontario Poor Overseers*, 15 Barb. 290.

§ 547. When Presumption of Legitimacy will Govern.—The legal presumption is that a child born subsequent to the marriage of its mother, although begotten before that time, is the child of the husband. And the admission by a third person that the child was begotten by him, and not by the subsequent husband of the mother, is not evidence to rebut such legal presumption, in a suit to annul the marriage upon the ground that the consent of the husband to the marriage contract was obtained by fraud. *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

§ 548. Resemblance as a Test of Parentage.—The learned author of "Beck's Medical Jurisprudence" says: "It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is however, a circumstance connected with this, which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose

husband is also white, or of a black woman whose husband is a negro." In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. *Warlick v. White*, 76 N. C. 175; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588.

In North Carolina the supreme court of that state holds that such exhibitions may properly be made. See *State v. Woodruff*, 67 N. C. 89; and *State v. Britt*, 78 N. C. 439; *Warlick v. White*, 76 N. C. 175; and *State v. Bowles*, 52 N. C. 579. The same was held by the supreme court of Iowa in *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192. In the last case the child was over two years old; but, in the case of *State v. Danforth*, 48 Iowa, 43, 30 Am. Rep. 387, the same court held it was improper to exhibit to the jury a child only three months old. In *Eddy v. Gray*, 4 Allen, 435; *Jones v. Jones*, 45 Md. 144; *Keniston v. Rowe*, 16 Me. 38, the courts hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible; and in *Reitz v. State*, 33 Ind. 187, and *Risk v. State*, 19 Ind. 152, it was held error to permit the prosecution to give the child in evidence, so that the jury might compare it with the defendant, who was present in court.

In the *Douglas Case*, cited in Wills, Circ. Ev. (5th Am. ed.) 117, Lord Mansfield is reported as saying: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude and action." See *Hanawalt v. State*, 64 Wis. 84.

§ 549. **Charge may be Sustained by Preponderance of Testimony.**—The charge of bastardy may be sustained by a preponderance of the testimony. *Mann v. People*, 35 Ill. 467; *Maloney v. People*, 38 Ill. 62; *Allison v. People*, 45 Ill. 37; *McCoy v. People*, 65 Ill. 439; *People v. Christman*, 66 Ill. 162; *McFarland v. People*, 72 Ill. 368; *Lewis v. People*, 82 Ill. 104; *State v.*

McGlothlen, 56 Iowa, 544; *Richardson v. Burleigh*, 3 Allen, 479; *Young v. Makepeace*, 103 Mass. 50; *People v. Collier*, 1 Mich. 140; *Semon v. People*, 42 Mich. 141; *State v. Nichols*, 29 Minn. 357; *State v. Rogers*, 79 N. C. 609; *Stovall v. State*, 9 Baxt. 597.

In Wisconsin, they hold that the charge must be proved beyond a reasonable doubt. *Baker v. State*, 47 Wis. 111; *Van Tassel v. State*, 59 Wis. 351. *Bailey*, Conflict of Judicial Decisions, p. 85.

NOTE.—*Effect of subsequent marriage of the parents on antenuptial issue.*

The general current of authority favors the doctrine that where an illegitimate child has been legitimated by the subsequent marriage of its parents according to the laws of the state or country where the marriage takes place, and the parents are domiciled, such legitimacy follows the child wherever it may go. *Miller v. Miller*, 91 N. Y. 315.

Each state has the right to determine the status of its own citizens; the domicil decides which state has the right. *Strader v. Graham*, 51 U. S. 10 How. 93, 13 L. ed. 342; *Story*, Conf. L. 141, § 106.

Foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicil of origin.

It seems admitted by foreign jurists, that as the validity of the marriage must depend upon the law of the country where it is celebrated, the status or condition of the offspring, as to legitimacy or illegitimacy, ought to depend on the same law, so that if by the law of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property. *Story*, Conf. L. § 93.

Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the state affecting all these personal qualities of its subjects travel with them wherever they go and attach to them in whatever country they may be resident. *Wheaton*, Law of Nations, 172.

When an illegitimate child has, by the subsequent marriage of his parents, become legitimate by virtue of the laws of the state or country where such marriage took place, and the parents were domiciled, it is therefore legitimate everywhere, and entitled to all the rights flowing from that status, including the right to inherit. *Miller v. Miller*, 91 N. Y. 315.

In cases of intestacy personal property is distributed according to the law of the place of the domicil of the intestate. *Parsons v. Lyman*, 20 N. Y. 103, 112; *Moultrie v. Hunt*, 23 N. Y. 394; *Story*, Conf. L. § 380.

But real estate in such cases descends according to the law of the place where it is situated. *White v. Howard*, 46 N. Y. 144–159; *Story*, Conf. L. § 424.

In this case it was held that an antenuptial child born in Scotland, of persons domiciled there, could not inherit lands in England, though by the law of Scotland the child had been legitimated by the subsequent intermarriage of the parents. The rule laid down in this case has been uniformly followed in England. *Don's Estate*, 4 Drew. 197; *Re Wright*, 2 Kay & J. 595; *Re Wilson's Trusts*, L. R. 1 Eq. Cas. 247; *Shaw v. Gould*, L. R. 3 H. L. 55.

An antenuptial child was born in South Carolina, in which state the parents

intermarried, but at that time their intermarriage did not legitimate the child. Subsequently, the three became citizens of Mississippi, where antenuptial children were legitimated by the subsequent intermarriage of the parents. The father died intestate. It was held that the status of the child was fixed by the domicile of its origin; where it was illegitimate, it so remained, and could not inherit. *Smith v. Kelley*, 23 Miss. 167.

A child born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage, either at the time of the birth or afterwards), though legitimate by the law of Scotland, cannot take, as heir, lands of his father in England. *Birtwhistle v. Vardill*, 7 Clark & F. 895.

The English judges, in *Doe v. Vardill*, 5 Barn. & C. 438, did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous born issue, and that, being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, that a person who inherits land in England must not only be legitimate, but must have been actually born in wedlock. *Ross v. Ross*, 129 Mass. 252-254; *Miller v. Miller*, 91 N. Y. 321, 322.

In addition to the cases cited in *Ross v. Ross* and *Miller v. Miller*, *supra*, and in the notes to *Stewart v. Stewart*, 31 N. J. Eq. 407, and to *Busson v. Forsyth*, 32 N. J. Eq. 285, a few recent cases are appended; *Atkinson v. Anderson*, L. R. 21 Ch. Div. 100; *Re Grove*, L. R. 40 Ch. Div. 216; *Keegan v. Geraghty*, 101 Ill. 26; *Stoltz v. Doering*, 112 Ill. 234; *Sunderland's Estate*, 60 Iowa, 732; *Scott v. Key*, 11 La. Ann. 232; *Caballero's Succession*, 24 La. Ann. 573; *Stack v. Stack*, 6 Dem. 280; *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603, *note*.

The question involved was elaborately discussed in England, in *Doe v. Vardill*, 5 Barn. & C. 438, *sub nom.* *Birtwhistle v. Vardill*, 2 Clark & F. 571, 7 Clark & F. 895; in New York, in *Miller v. Miller*, 91 N. Y. 321; and in Massachusetts, in *Ross v. Ross*, 129 Mass. 252. In the latter case Chief Justice Gray cites and comments upon every case up to that date (1880) and, after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding, in *Doe v. Vardill*, that an heir to land in England must be actually born in wedlock, do not apply in this country, and that a person declared to be a legitimate child of another, by the law of the state of the domicile, must be held to have all the rights of a legitimate child wherever he goes.

An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the statute, so-called, of Merton, 20 Hen. III. chap. 9, which, it was claimed, negatively enacted that the English heir must be born in lawful wedlock. Lord Brougham, in 2 Clark & F. 582, and again, in 7 Clark & F. 914, combats this position with arguments that the courts of New York and Massachusetts seemed to think unanswerable. *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

The relation of husband and wife being a status based upon the contract of the parties, and recognized by all Christian nations, the validity of that contract, if not polygamous, nor incestuous, is governed by the law of the place of the contract; this status, once legally established, should be recognized everywhere as fully as if created by the law of the domicile; and therefore any such marriage, valid by the law of the place where it is contracted, is valid everywhere to all intents and effects, civil or criminal, including the settlement

of the wife and children, her right of dower, and their legitimacy and capacity to inherit the father's real estate. *Parsons, Ch. J.*, in *Greenwood v. Curtis*, 6 Mass. 358, 377-379; *Medway v. Needham*, 16 Mass. 157; *West Cambridge v. Lexington*, 1 Pick. 506; *Putnam v. Putnam*, 8 Pick. 433; *Com. v. Lane*, 113 Mass. 458; *Bullock v. Bullock*, 122 Mass. 3; *Milliken v. Pratt*, 125 Mass. 380, 381.

Under the provisions of the celebrated "Code Napoleon," enacted in 1804, and substantially adopted in many of the American states, humane regulations as to legitimacy will be found established. No. 331 is in the following language:

Children born out of wedlock, other than such as are the fruit of an incestuous or adulterous intercourse, may be legitimated by the subsequent marriage of their father and mother, whenever the latter shall have legally acknowledged them before their marriage, or shall have recognized them in the act itself of celebration. The germ of this enactment dates back to the Roman law.

A natural son born of a free woman, with whom marriage is not prohibited, will become subject to the power of the father as soon as the marriage instruments are drawn as the Constitution directs; which allows the same benefit to those who are born before marriage as to those who are born subsequent thereto. *Cooper, Justin. De Legitimatione*, lib. 1, title 10, § 13.

A charge of illegitimacy must be supported by direct and irrefutable evidence. It must be conclusively proved. *Caujolle v. Ferrie*, 23 N. Y. 90.

As to the marriage at common law, and the evidence tending to prove it, see *Hebblethwaite v. Hepworth*, 98 Ill. 132; *Port v. Port*, 70 Ill. 486; *Caujolle v. Ferrie*, 23 N. Y. 107; 2 Greenl. Ev. § 462; 1 Bishop, Mar. & Div. §§ 13, 457, note, 1521; *Stoltz v. Doering*, 112 Ill. 234.

The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, *eo nomine*, is therefore a legitimate child. *Fielder v. Fielder*, 2 Hagg. Consist. Rep. 197, 4 Eng. Eccl. Rep. 527; *Wilkinson v. Adam*, 1 Ves. & B. 422.

In *Vowles v. Young*, 13 Ves. Jr. 145, Lord Chancellor Erskine said, in reference to proof of an actual marriage, that the evidence, especially in the case of obscure families, must be very slight. As sustaining the same rule, may also be cited *Starr v. Peck*, 1 Hill, 270; and the qualification of that case, as made in *Cheney v. Arnold*, 15 N. Y. 345, does not weaken its authority on the question of the duty of a court to presume matrimony, when the parties have cohabited, and there are circumstances from which a contract may be inferred. *Caujolle v. Ferrie*, 23 N. Y. 90.

At common law a bastard has no right of inheritance. In the eyes of the law, bastards are not regarded as children for civil purposes. 1 Bl. Com. p. 458, in discussing the rights of bastards, says: "The rights are very few, being only such as he can acquire, for he can inherit nothing, being the son of nobody, and sometimes called *filius nullius*, sometimes *filius populi*. In *Blacklows v. Milne*, 82 Ill. 505, it was held that the common law rule which excluded illegitimate children from inheriting was in force in that state.

Words and terms having a precise and well settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended. The word "illegitimate," when used in this connection, has, by the common law, and the law of this state, a well defined meaning, which is, begotten and born out of wedlock. 1 Rev. Stat. 641, § 1; 2 Kent, Com. 208, 209; 1 Bl. Com. 454, 455.

The so-called "Statute of Merton."

The Statute of Merton was enacted at the priory of Merton, in Surrey, in the year 1236. It is worthy of remark, that the famous Statute of Merton, 20 Hen. III. chap. 9, is, in fact, not a statute, but a mere entry on the minutes of Parliament of a refusal by the English lords to assimilate the laws of England to that of other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate. *Dayton v. Adkisson*, 4 L. R. A. 488, 45 N. J. Eq. 603.

Before and during the reign of Henry III., if it was alleged that the person claiming as heir was illegitimate, a writ was issued to the archbishop, or bishop, commanding that inquiry and return upon this issue be made to the king or his justices. 1 Reeves, Hist. chap. 3, 168. By the canons of the church, the rule of the Roman law, the subsequent intermarriage of parents legitimated antenuptial children, and the ecclesiastics were inclined to return according to the canons of their church, and contrary to the common law.

At the Parliament of Merton the ecclesiastics endeavored to enact the rule of their church, but "all the earls and barons, with one voice, answered that they would not change the laws of England which had hitherto been used and approved." 1 Bl. Com. 19, 456; 2 Kent, Com. 209. No change whatever was made at Merton; and, thereafter, the ecclesiastics were required to return the facts, whether the claimant was begotten and born out of wedlock, and judgment was rendered by the courts according to the common law. 1 Reeves, Hist. chap. 3, 169.

Bracton, an ecclesiastic, as well as lawyer, who wrote, it is supposed, in the time of Henry III., in discussing the effect of the legitimation of antenuptial children by the subsequent intermarriage of their parents, said: "It follows to consider how the illegitimate are legitimated, and it is to be known, that if anyone has natural children by any woman, and afterwards contracts marriage with her, the children already born are legitimated by the subsequent marriage, and are reckoned fit for all lawful acts, nevertheless only for those which regard the sacred ministry, but they are not legitimate for those which regard the realm, nor are they adjudged to be heirs who can succeed to their relatives, on account of a custom of the realm, which is of a contrary import." Chap. 29, f. 63, b. or vol. 1, p. 503, of the Lords Commissioners' edition.

It may be safely asserted that the decisions of the English courts rest on the common law. *Fenton v. Livingstone*, 5 Jur. N. S. pt. 1, p. 1183, holds that the Statute of Merton is only declaratory to the common law.

But it is not very material whether they rest on the common law or the early statutes, because the English statutes enacted before the settlement of this country are a part of its common law. *Bogardus v. Trinity Church*, 4 Paige, 198; 1 Kent, Com. 473.

The principles supposed to be incorporated in the so-called Statute of Merton are fully recognized by special legislation in the following states are summarized by Snyder in his *Geography of Marriage*, as follows:

In Arizona, the children of a man and woman living together as man and wife, or of persons living together, who subsequently marry, are legitimate.

In Florida, Iowa, Minnesota, Montana, Nevada, Oregon, Pennsylvania and Washington, children born out of wedlock become legitimate by the subsequent marriage of their parents.

In Connecticut, where the parents of children born out of wedlock subsequently marry, and recognize such children as theirs, they shall be deemed legitimate. Stat. 1876.

In Virginia and West Virginia children born out of wedlock, whose parents subsequently marry, if recognized by the father before or after marriage, shall be deemed legitimate.

In New Hampshire, where the parents afterwards marry and recognize them, they shall inherit as if they were legitimate.

In Illinois, Indiana, Massachusetts, Ohio, Vermont, Wisconsin and Wyoming a child born out of wedlock, whose parents shall subsequently marry, and whose father acknowledges such child, shall be deemed legitimate.

In New Mexico, children legitimated by a subsequent marriage of their parents are as direct heirs as legitimate children, with the exception of the right of primogeniture.

In North Carolina, children born out of wedlock can become legitimate only upon petition of the father, which must be presented to the superior court of the county, where he resides, and if it appear that he is the father of the child, the court may make a decree to that effect which shall be recorded by the clerk, and such child may then inherit from his father only.

In Michigan, children born out of wedlock become legitimate by the subsequent marriage of their parents, or, if they do not marry, the father can make the child "legitimate in law" by so acknowledging in writing, executed like a deed of land.

In Nebraska, children born out of wedlock become legitimate if the parents afterwards marry and have been adopted in the family with other children born in wedlock, or shall have been acknowledged by the father in writing, signed in the presence of one witness.

In Louisiana, children born out of wedlock, except those born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, when legally acknowledged before marriage, by an act passed before a notary and two witnesses, or by their contract of marriage itself. They are then known as natural children.

CHAPTER LXII.

SEDUCTION UNDER PROMISE OF MARRIAGE.

§ 550. *Term Defined.*

551. *Nature of the Proof.*

552. *Previous Chastity of the Woman the Main Issue.*

553. *Distinction between Seduction and Rape.*

554. *Presumption as to Chastity, how Rebutted.*

555. *Corroboration Required as to Promise and to Intercourse.*

556. *Time not Material.*

§ 550. **The Term Defined.**—Webster defines seduction as “the act or crime of persuading a female, by flattery or deception, to surrender her chastity.” Seduction has been defined as “the use of some influence, promise, art or other means on the part of a man by which he induces a woman to surrender her chastity and virtue to his embraces.” Anderson, Law Dict. 932; *Croghan v. State*, 22 Wis. 444; *Patterson v. Hayden*, 3 L. R. A. 529, 17 Or. 238, 11 Am. St. Rep. 822; in this last case the court say: “Courts have been more inclined to follow Webster’s definition than those given by the legal lexicographers.”

A woman cannot be said to be “seduced” who at the time of the alleged seduction was leading a lewd and lascivious life. *Patterson v. Hayden*, 3 L. R. A. 529, 17 Or. 238.

§ 551. **Nature of the Proof.**—The jury may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness, and corroboration as to the promise is satisfied by proof of the circumstances usually attending an engagement of marriage. Mo. Rev. Stat. § 1912; *State v. Brassfield*, 81 Mo. 152, 51 Am. Rep. 234, and cases cited; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644.

Evidence of general reputation of the girl’s want of chastity is inadmissible. Previous chaste character, in this statute, means actual personal virtue, not reputation; and can be impeached only by specific proof of lewdness. *Kenyon v. People*, 26 N. Y. 203–207, 5 Park. Crim. Rep. 254–285, 84 Am. Dec. 177; *Carpenter v. People*, 8 Barb. 603–607; *Kauffman v. People*, 11 Hun, 82.

Although the female has previously fallen from virtue, yet if

she has subsequently reformed and become chaste, she may be the subject of the offense declared in the statute. *Carpenter v. People*, 8 Barb. 603.

The crime is a most atrocious one, and one which most naturally tends to enlist the sympathies of all men, and of course of jurors, in favor of the victim. In such cases, while administering the law with perfect fairness, courts must be extremely careful that no evidence of a tendency to excite or influence the resentment of jurors, and which does not tend to support the evidence of the prosecutrix, or to connect the defendant with the commission of the crime, should be permitted to go to the jury. *People v. Kearney*, 110 N. Y. 188.

It was necessary to support the prosecutrix by other evidence than her own as to the promise of marriage and the intercourse. *Kenyon v. People*, 26 N. Y. 207, 5 Park. Crim. Rep. 254, 84 Am. Dec. 177; *People v. Heine*, 8 N. Y. Legal Obs. 139; *Boyce v. People*, 55 N. Y. 645; *People v. Haynes*, 55 Barb. 450; *State v. Crawford*, 34 Iowa, 40; *Com. v. Walton*, 2 Brewst. 487; *People v. Zeiger*, 6 Park. Crim. Rep. 356; *Armstrong v. People*, 70 N. Y. 38.

In trials for seduction under promise of marriage, the evidence of the woman as to such promise must be corroborated to the same extent required of a principal witness in perjury. From these statutes it is plain to be seen that corroborating evidence is only required as to the promise of marriage, and in that respect to the extent of the principal witness in perjury. In cases of perjury, it is not required that the corroborating circumstances should be equal to a second witness. The additional evidence, it was said in *State v. Heed*, 57 Mo. 254, need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must at least be strongly corroborative of the testimony of the accusing witness. There must be some evidence, independent of the principal witness; any material circumstance proved by other witnesses, in confirmation of the witness who gave the direct testimony will be sufficient. Roscoe, Crim. Ev. (6 Am. ed.) 765. We can, then, apply these guides to cases like the one in hand. Evidence of circumstances which usually accompany the marriage engagement will satisfy the statute as to supporting evidence. *State v. Brassfield*, 81 Mo. 156, 51 Am. Rep. 234. That case, it is true, was overruled in *State v. Patterson*, 88 Mo. 88, 57 Am.

Rep. 374, in one respect, but not as to the question now under consideration.

Under the provision of an act declaring that a conviction shall not be had upon the testimony of the female seduced, unsupported by other evidence, supporting evidence is only required as to the promise of marriage, and the carnal connection.

As to the promise of marriage the provision is satisfied by proof of circumstances which usually attend an engagement of marriage; as to the illicit intercourse and the immediate persuasions and the inducements which led the female to consent, evidence of opportunities more or less frequent and continued, and that the relations of the parties were such as indicated that confidence in and affection for the accused, on the part of the female which rendered it possible that the act may have been done, are sufficient.

The fact that the prosecutrix in her testimony limits the carnal connection to a single act, and specifies the time, does not require that the supporting evidence shall be confined to that particular time; if it covers a period including the specified time it is sufficient to meet the requirements of the statute, although there is no corroborative evidence as to the particular act testified to. *Armstrong v. People*, 70 N. Y. 38.

On an indictment for seduction under promise of marriage, under the laws of 1848, chapter 111,—which constitutes such an act a misdemeanor,—although an express promise on the part of the defendant ought to be proved, it is not necessary that there should be proof of an express promise on the part of the person seduced, in order to support defendant's promise. A promise on her part, if necessary at all, may be inferred from circumstances.

It seems, that a promise on the part of the defendant alone, is enough to sustain a conviction.

On an indictment for seduction under promise of marriage, the previous chaste character of the complainant is presumed until evidence impeaching it is produced. *People v. Kane*, 14 Abb. Pr. 15.

There must be a promise of marriage, seduction of and illicit connection with an unmarried female, who must have been of "previous chaste character," and the indictment must be found within two years after the commission of the offense; and the prosecution cannot be sustained by the testimony of the female seduced, unsupported by other evidence. *Safford v. People*, 1 Park. Crim. Rep. 474.

So, too, the act of illicit connection, and the immediate persuasions and inducements, which led to the compliance, need not be proved by the evidence of third persons directly to the fact. They are to be inferred from the facts; that the man had the opportunities, more or less frequented and continued, of making the advances and the proposition; and that the relations of the parties were such, as that there was likely to be that confidence on the part of the woman in the asseverations of devotion on the part of the man, and that affection towards him personally, which would overcome the reluctance on her part, so long instilled as to have become natural, to surrender her chastity. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644.

Circumstances of this kind vary in weight in different cases, and it is for the jury to determine their strength. But, when proof is made of the existence of them, in some degree, it cannot be said that there is no supporting evidence. A court cannot then properly direct a verdict, or discharge the defendant in the indictment, on the ground that no case is made for the consideration of the jury. *Armstrong v. People*, 70 N. Y. 44.

I think the true rule is, in cases like this, when there is some evidence given by other witnesses, which supports the testimony of the prosecutrix, on the material questions in the case, the jury must determine whether she is sufficiently corroborated to warrant a verdict of guilty. And this conclusion is in harmony with the decision in *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Crandall v. People*, 2 Lans. 309.

§ 552. Previous Chastity of the Woman the Main Issue.—An important requisite to the offense charged is, that the female against whom it is alleged to have been committed, shall have been of a previously chaste character. The requisition of the statute, it is held, relates not to the reputation of the prosecutrix but to her actual condition, and requires absolute personal chastity. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. It is, therefore, impossible that the offense be twice committed against the same female. If she has once consented to and willingly permitted sexual intercourse with herself, she no longer possesses that chaste character required by the statute as an essential ingredient of the offense. Accordingly where a seduction under a promise of marriage had taken place four or five years before the indictment,

and the illicit intercourse and the promise of marriage had continued down to within less than two years before indictment found, it was held that the offense could not have been committed within the two years limited by the statute before indictment found. *Safford v. People*, 1 Park. Crim. Rep. 474; *Cook v. People*, 2 Thomp. & C. 406.

The chastity of the woman is directly in issue in these cases (*State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374) and it is not the proper province of the court to determine the weight of the evidence.

To overcome the presumption of previous chastity, defendant must show unchastity by a preponderance of evidence. *State v. Hemm*, 82 Iowa, 609.

Though the law presumes that every woman is chaste and of good repute, it also presumes every one innocent of crime till proven guilty, and in prosecutions for seduction the burden is on the state to allege and prove in the first instance that the woman is of good repute. *State v. McCaskey*, 104 Mo. 644.

Under indictment for seduction, where the evidence showed that the prosecutrix, at the time she yielded to the defendant, was a child a few days past the age of fourteen, and of weak mental development; that before the first act of intercourse defendant, who was a man of thirty-five, not only promised to marry her, but stated to her that many other young girls of the neighborhood were in the habit of engaging in sexual intercourse—it was error for the court to refuse to permit the fullest investigation into their subsequent relations with a view of showing whether defendant entered into such contract of marriage in good faith at the time, or merely to gratify his lust. *State v. Mackey*, 82 Iowa, 393.

The court refused to charge that “the defendant has offered evidence . . . of specific language and conduct on the part of the prosecutrix which, he claims, shows her to be of unchaste character at the time of the alleged seduction, and you are instructed that it was the right of the state to introduce evidence . . . rebutting” this “testimony.” Held, that as the instruction fixed no consequences to the neglect of the state to introduce such evidence, it was properly refused as misleading. *State v. Hemm*, 82 Iowa, 609.

Under an indictment for seduction, it is error to instruct that

the burden of showing defendant's subsequent refusal to marry the prosecutrix is upon the state, since an offer of marriage after seduction is not a bar to the prosecution, but only an actual marriage. *State v. Mackey*, 82 Iowa, 393.

In prosecutions for seduction, it is usually required by statute that the prosecutrix should be corroborated at least as to promise of marriage. *Com. v. Walton*, 2 Brewst. 487; *State v. Painter*, 50 Iowa, 317; *State v. Curran*, 51 Iowa, 112.

The prosecutrix also testified that the accused, to induce her to consent to his proposal, stated in substance that he never would marry a girl unless he was satisfied that she was a virgin, which he could ascertain only by her assenting to his proposition. But upon her expressing apprehension that he would leave her if she yielded to him, he assured her, in the strongest terms, that he would marry her. The prisoner's counsel asked the court to charge in substance that, if the promise to marry was not an existing one, but an inchoate proposition depending upon the result of illicit intercourse as furnishing evidence of virtue to complete the mutuality of the contract, the case was not within the statute. The court declined so to charge. Held (Church, *Ch. J.*, and Rapallo, *J.*, dissenting) no error, as there was no just foundation in the evidence to claim that the promise was to marry only in case the accused should be satisfied that the prosecutrix was a virgin; that it was to the promise and not to any test of virginity that she gave her consent.

The time of the alleged seduction was February 5, 1871, followed by subsequent intercourse down to August. It was proved, without objection, that the prosecutrix was delivered of a child February 10, 1872. The prosecution disclaimed any reliance upon this fact as corroborating the evidence of the prosecutrix; the court held the evidence immaterial.

The prisoner's counsel offered evidence that between the 5th of February and May 1st, 1871, the prosecutrix had carnal connection with another man, which was excluded. Held (Church, *Ch. J.*, and Rapallo, *J.*, dissenting) no error; that pregnancy was not essential to the consummation of the offense charged; that the evidence rejected could only have been material to obviate the effect of that fact as corroborative evidence, and, as that was expressly disavowed, the rejection was proper. Also, that the rejection could be sustained upon the ground that the offer was

not limited to show any illicit intercourse at a time when the child could have been begotten, and was in effect simply to show that after the alleged seduction she had been guilty of fornication with another person, which was clearly incompetent. *Boyce v. People*, 55 N. Y. 644.

It is not sufficient to establish the sexual intercourse, but the plaintiff must show that defendant accomplished his purpose by some promise or artifice, or that she was induced to yield to his embrace by flattery or deception. If without being deceived, and without any false pretense, deceit or artifice, she voluntarily submitted to the connection, the law affords her no remedy. *Smith v. Milburn*, 17 Iowa, 30.

The prosecutrix must be supported by other evidence as to all of the elements which are necessary to contribute to the crime, before the jury can convict. If the corroborative evidence supports one or more, and yet fails to support all the necessary elements, such support is not given as the law requires to allow or sustain a conviction. See N. Y. Penal Code, § 286; *People v. Plath*, 100 N. Y. 590, 53 Am. Rep. 236; *Armstrong v. People*, 70 N. Y. 38. In criminal trials where the fact proved or corroborated is consistent with innocence, it cannot be accepted as any proof of guilt. *People v. Elliott*, 106 N. Y. 288; *State v. Warren*, 34 Iowa, 453; *People v. Josselyn*, 39 Cal. 398; *People v. Williams*, 29 Hun, 520.

The testimony of a female seduced is sufficiently supported by proof of opportunity and confiding freedom of relations. *Armstrong v. People*, 70 N. Y. 38. In all cases the sufficiency of the supporting evidence is for the jury, and it is reversible error to withdraw this question of sufficiency from their consideration. *Crandall v. People*, 2 Lans. 309; *Armstrong v. People*, 70 N. Y. 44. Circumstantial evidence was always sufficient in supporting an accomplice, corroboration being required only as to the person of the accused; that is, testimony showing that the defendant was the party who committed the crime. Whart. Crim. Ev. § 442. In the case of an accomplice, whether evidence is sufficient is for the determination of the jury; the law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime, so that his conviction will not rest entirely upon the evidence of the accomplice. *People v. Everhardt*, 104 N. Y. 594; *People v. Elliott*, 106 N.

Y. 288; *People v. Jaehne*, 103 N. Y. 182; *Crandall v. People*, *supra*; *People v. Plath*, 100 N. Y. 594, 53 Am. Rep. 236. No corroboration is required as to previous chastity or as to the fact of being married. *Armstrong v. People*, *supra*; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *Jenkins v. Putnam*, 106 N. Y. 272. Corroboration is required as to the promise and intercourse only, and not with respect to chastity or being unmarried. *Kenyon v. People* and *Crandall v. People*, *supra*. Supporting evidence was required as to two matters only, to wit, the promise of marriage and carnal connection. *Kenyon v. People* and *Boyce v. People*, *supra*. In prosecutions for adultery or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to or when indicating continuance of illicit relations, even subsequent to the act specifically under trial. *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Crandall v. People*, *supra*. The statute requires only previous chastity. N. Y. Penal Code, § 284; *Armstrong v. People*, *supra*. The supporting evidence need not be such only as the character of the matters admits of being furnished. It was for the jury to say whether the supporting evidence was sufficient. *People v. Armstrong*, *Crandall v. People*, *People v. Elliott* and *People v. Everhardt*, *supra*.

§ 553. **Distinction between Seduction and Rape.**—The crime of seduction is not to be confounded with the higher and more atrocious crime of rape. The latter crime is defined to be the carnal knowledge of a woman by a man forcibly and unlawfully, against her will. 2 Bouvier, Law Dict. title *Rape*. The element of force forms a material ingredient of the offense, by which a resistance of the woman violated is overcome, or her consent induced by threats of personal violence, duress or fraud. For, unless the consent of the woman to the unlawful intercourse is freely and voluntarily given, the offense of rape is complete. But the word “seduction,” when applied to the conduct of a man towards a female, is generally understood to mean the use of some influence, promise, arts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. But we do not suppose that it must appear that any distinct promise was made to the female, or any subtle art or device employed. It is sufficient that the means used to accomplish the

seduction, induced the female to consent to the sexual intercourse. Perhaps the motive of fear on the mind of the female is not to be excluded—not the fear of personal violence and injury unless she consents to the connection, but the fear that the man may in some way injure her reputation or standing in society, unless she yields to his importunities. But the woman must be tempted, allured, and led astray from the path of virtue, though the violence of some means or persuasion employed by the man, until she freely consents to the sexual connection. But if the circumstances show that this consent was obtained by the use of force, and the woman's will was overcome by fear of personal injury, then the crime becomes one of a higher grade. *Croghan v. State*, 22 Wis. 444.

Evidence is admissible that the defendant boasted to his friends that he had had illicit intercourse with the prosecutrix, as tending to show not alone the illicit connection, but also, in view of the circumstances under which the admissions were made, the deceptive practices by which it was brought about. *State v. Hill*, 91 Mo. 423.

Evidence which shows that the woman lived with her father and bore his name, that she had received the addresses of the defendant for more than three years, and that a marriage agreement existed between them when the crime was committed, is sufficient to warrant the jury to find that the woman is unmarried. *State v. Heatherton*, 60 Iowa, 175.

§ 554. **Presumption as to Chastity, how Rebutted.**—Under a statute making it indictable to seduce a female of good repute for chastity, under promise of marriage, the state must prove her good repute affirmatively; it will not be presumed. In a recent case the court below had charged the jury that the law presumes every woman to be of good repute for chastity; that this presumption must be destroyed by proof of bad repute, in the absence of which the defendant may be convicted. This, as seen by the syllabus quoted, was held to be error. The court, enumerating the elements of the offense described by the statute of New Jersey, that, 1st, the defendant must be a single man over the age of eighteen; 2d, the defendant must be a single woman; 3d, she must be under the age of twenty-one; 4th, she must be of good repute for chastity; 5th, the sexual intercourse must have been had under a promise of marriage; 6th, she must thereby become pregnant;

and 7th, the evidence of the female must be corroborated to the extent required in case of indictment for perjury, says: "These are essential elements of the offense; the presence of each and all of them is necessary to conviction, and the absence of any of them is fatal to the case of the state. The burden rests upon the state to prove the guilt of the accused beyond a reasonable doubt, and therefore each of these facts must be established. . . . Good repute for chastity is a quality which may or may not exist in the prosecutrix; women are not all chaste; the statute itself recognizes two classes, those of good repute and those not of good repute. With the former class only can the statutory crime possibly be committed. . . .

"A woman who comes into court with a bastard child in her arms, is not a representative of her sex; happily she represents a very insignificant portion of it. The fact that she has sacrificed that virtue which was her glittering crown, casts such a shadow upon her, that in the most charitable view of the case, it should be left without presumption either way, to be determined by competent evidence what her prior repute has been. Her immoral conduct, unless mitigating circumstances are shown, classes her with the vicious and disreputable, and, as to her, negatives the presumption of purity, so universally accorded to her sex. The question is, not whether the vast majority of females are of good repute, but whether in this case it shall be presumed as a fact against the defendant that the woman with whom the crime is alleged to have been committed, and who carries with her the evidence of her shame, is of good repute. The rule, if well founded, must be of universal application, and involves the broad proposition that of the entire class of women who bear illegitimate children, it must be presumed that every one who prefers a charge of this kind is of good repute for chastity. It will be more reasonable to reverse the proposition. . . .

"She has avowedly participated with the defendant in a violation of the criminal law, and she must be regarded as *in pari delicto* until those material facts (of which her good repute is one) are shown to exist which aggravate the character of the *delictum* and make the defendant alone amenable to the higher statutory crime. To assert that a woman establishes a claim before the law to the presumption of good repute for chastity, when she admits her dereliction, seems contrary to reason and propriety, and places

her upon the same plane with those whose lives have been blameless." *Zabriskie v. State*, 43 N. J. L. 641, 39 Am. Rep. 610. See 3 Crim. L. Mag. 338.

§ 555. **Corroboration Required as to Promise and Intercourse.**—Corroboration is required as to the promise and intercourse only, and not with respect to chastity or being unmarried. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Crandall v. People*, 2 Lans. 309. Circumstantial evidence was always sufficient in supporting an accomplice, corroboration being required only as to the person of the accused; that is, testimony showing that the defendant was the party who committed the crime. Whart. Crim. Ev. § 442. In the case of an accomplice; whether evidence is sufficient is for the determination of the jury, the law is complied with if there is some other evidence fairly tending to connect the defendant with the commission of the crime, so that his conviction will not rest entirely upon the evidence of his accomplice. *People v. Everhardt*, 104 N. Y. 294; *People v. Elliott*, 106 N. Y. 292; *People v. Jaehne*, 103 N. Y. 182; *Crandall v. People*, *supra*; *People v. Plath*, 100 N. Y. 594, 53 Am. Rep. 236. The supporting evidence need be such only as the character of the matters admits of being furnished. It was for the jury to say whether the supporting evidence was sufficient. *Armstrong v. People*, 70 N. Y. 44; *Crandall v. People*, *People v. Elliott* and *People v. Everhardt*, *supra*. In prosecutions for adultery or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to or when indicating continuance of illicit relations, even subsequent to the act specifically under trial. Whart. Crim. Ev. (8th ed.) § 35; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Crandall v. People*, *supra*. The statute requires only previous chastity. N. Y. Penal Code, § 284; *Armstrong v. People*, *supra*. No corroboration is required as to previous chastity or as to the fact of being unmarried. *Armstrong v. People* and *Kenyon v. People*, *supra*; *Boyce v. People*, 55 N. Y. 644; *Jenkins v. Putnam*, 106 N. Y. 272; *People v. Kearney*, 110 N. Y. 190.

Under the New York act to punish seduction as a crime (Laws of 1848, chap. 111) it is sufficient that the defendant effected his object by a conditional promise that, if the girl would permit his illicit connection, he would marry her.

The submitting to his embraces upon this proposition is, it seems, a promise to marry on her part.

Evidence of general reputation of the girl's want of chastity is inadmissible. Previous chaste character, in this statute, means actual personal virtue—not reputation; and can be impeached only by specific proof of lewdness.

The corroboration of the seduced female, required by the statute, relates to the promise and the intercourse; it is not necessary in respect to her chastity or to her being unmarried.

The evidence of the seduced female is admissible that the promise of marriage was the inducement to the illicit intercourse.

It is unnecessary that the promise should be a valid one, or that the defendant be of full age. It is sufficient that he has arrived at the age of puberty. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177.

On a prosecution for seduction of a girl with whom defendant had previously had illicit intercourse, but who had again become of chaste character, evidence of other witnesses that defendant resumed his visits as a suitor, and continued them for several months, the same as persons contemplating marriage usually do, sufficiently corroborates the testimony of the prosecutrix to the principal facts. *State v. Gnagy* (Iowa) Dec. 18, 1891.

The defendant was convicted of seduction, under section 4015 of the Alabama Code, 1886, which declares: "No indictment or conviction shall be had under this section, on the uncorroborated testimony of the woman upon whom the seduction is charged." This clause of the statute was fully considered in *Cunningham v. State*, 73 Ala. 51. It was then construed as not requiring that other witnesses shall testify to every fact testified to by the woman; but that its requirements are met, when the corroboration is of some matter which is an element of the offense, and its effect is to satisfy the jury that the corroborated witness has testified truly. The true rule is stated as follows: "That the corroboration shall be such as to convince the jury, beyond a reasonable doubt, that the witness swore truly, but, to produce this conviction it must be in a matter material to the issue, and must tend to connect the defendant with that material matter, and the matter itself must not be in its nature formal, indifferent, or harmless." This instruction was re-affirmed in *Wilson v. State*, 73 Ala. 527, at a subsequent term of the court. The corroborating evidence

consisted of the defendant's frequent visits to the female for whose seduction he was indicted, his escorting her to church, parties, and other social gatherings, and his admission of an engagement and intention to marry her, made about the time of the alleged seduction. A promise of marriage is one of the alternative elements of the offense denounced by the statute. The corroboration was as to this act, with which the evidence connected defendant. His admissions were properly received in evidence. The phraseology of the charge of the court on this subject may be objectionable, as importing to the jury that the corroborating testimony was sufficient. Evidence may be sufficient to meet the statutory requirement as to corroboration, and yet not sufficient to satisfy the jury that the woman swore truly.

§ 556. **Time not Material.**—The exact time is never material. Although the prosecutrix may be quite positive in this respect, she is not infallible, and may be mistaken; and it is not material that the seduction occurred on the particular day named by the prosecutrix. It is therefore, not essential that she should be corroborated as to the exact day. In this connection we deem it proper to say that the instructions of the court, that if the seduction was accomplished about or near the time named in the indictment, and fixed by the prosecutrix in her evidence, it was sufficient, are correct. *State v. Bell*, 49 Iowa, 440; *State v. McClin-tic*, 73 Iowa, 663.

As to further evidence necessary to sustain an action for seduction, see *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *Wilson v. State*, 58 Ga. 328. On evidence to impeach the chastity of the female, see *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Love v. Masoner*, 6 Baxt. 24, 32 Am. Rep. 522. Where the offense charged is the last of several similar acts, the jury may consider them as the elements of one wrong. *Haymond v. Saucer*, 84 Ind. 3.

It is not necessary that the promise should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an unmarried female under promise of marriage. It is enough that a promise is made which is a consideration for or inducement to the intercourse. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. This case is approved in *Boyce v. People*, 55 N. Y. 644. In that case the promise was one conditioned upon a consent to illicit connection. That con-

sent, based upon such a promise was within the law. It was held, in *Armstrong v. People*, 70 N. Y. 38, that the question was not presented by the case.

Any line of conduct on the part of a parent, from which there may be justly inferred an assent to, or connivance at the illicit intercourse, will deprive him of all right to maintain an action for the seduction of his daughter. Such conduct, even if not amounting to an absolute assent, but showing want of due care on his part, may be taken into account in measuring the damages. It is no excuse for the parent that such conduct was in conformity with the customs of the community in which he lived. *Graham v. Smith*, 1 Edm. Sel. Cas. 267.

The chastity of the woman, at the time of the criminal connection, is an essential ingredient of the offense. The statute provides, "No conviction shall be had, if on the trial it is proved that such woman was, at the time of the alleged offense, unchaste." *Munkers v. State*, 87 Ala. 94.

In *Cook v. People*, 2 Thomp. & C. 404, the prosecutrix was asked, "and would you have consented to it (the connection) in the absence of a promise?" Held, inadmissible as calling for a merely speculative answer.

But the female may testify to the fact that she consented to the intercourse because of the promise. *State v. Brinkhaus*, 34 Minn. 285, 7 Crim. L. Mag. 343.

Evidence that defendant, subsequent to the seduction, had refused to marry the prosecutrix is inadmissible. *Cook v. People*, 2 Thomp. & C. 404. See *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211; *People v. DeFore*, 64 Mich. 693, 8 Am. St. Rep. 868; *State v. Prizer*, 49 Iowa, 531, 31 Am. Rep. 155; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Oliver v. Com.* 101 Pa. 215, 47 Am. Rep. 704; *People v. Roderigas*, 49 Cal. 9; *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17; *People v. Squires*, 49 Mich. 487; *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *State v. Higdon*, 32 Iowa, 262.

CHAPTER LXIII.

CRIMINAL LIBEL.

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§ 557. **The Term Defined.**—There are many definitions of libel. The one by Alexander Hamilton in his argument in *People v. Croswell*, 3 Johns. Cas. 203, viz: "A censorious or ridiculing writing, picture or sign, made with malicious intent towards government, magistrates or individuals," has been often referred to with approval; but, unless the word "censorious" is given a much broader signification than strictly belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation, may be libelous, although they convey no imputation upon his character. "Words," says Starkie, "are libelous if they affect a person in his profession, trade or business, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness or want of any neces-

sary qualification in the exercise thereof." Starkie, Slander & Libel, § 188.

Libel is the willful and malicious publication, in a permanent and visible form, of some matter tending to injure the reputation of another. *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137. See 4 Bl. Com. 150; 2 Whart. Am. Crim. L. (8th ed.) § 1504; 1 Hawk. P. C. chap. 73, § 1. Of deceased persons (*Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Anonymous*, 5 Coke, 125a) if done to bring the family into contempt, stir up hatred, or excite to a breach of the peace. *Com. v. Taylor*, 5 Binn. 281; *Rea v. Topham*, 4 T. R. 127; 2 Bishop, Crim. L. (6th ed.) § 905. It is a crime at common law (see *Com. v. Chapman*, 13 Met. 68; *Com. Holmes*, 17 Mass. 336; *State v. Burnham*, 9 N. H. 34, 31 Am. Dec. 217; *State v. Avery*, 7 Conn. 268, 18 Am. Dec. 105) an indictable offense (*Com. v. Chapman*, *supra*) it is not a private action, subject to compromise (*Reg. v. The World*, 13 Cox, C. C. 305) and neither retraction nor apology is a defense, going only in mitigation of damages. *Com. v. Morgan*, 107 Mass. 199. Whenever an action lies for libel without laying special damages, indictment lies. *Stanton v. Andrews*, 5 U. C. Q. B. 229; *Desty*, Am. Crim. L. § 140a.

§ 558. **What Constitutes Criminal Libel.**—"A malicious publication, by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel. A person who publishes a libel is guilty of a misdemeanor. A publication having the tendency or effect mentioned in section 242, is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect to public affairs, or upon a thing which the proprietor thereof offers or explains to the public." N. Y. Penal Code, §§ 242-244.

The rule derived from the authorities, and with which most of

the cases can be reconciled, seems to be this: When the words spoken have such a relation that the profession or occupation of the plaintiff tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application can be made. *Cawdry v. Highley*, Cro. Car. 270; *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137; *Davis v. Ruff*, 1 Cheves, L. 17, 34 Am. Dec. 584; *Ayre v. Craven*, 2 Ad. & El. 2; *Doyley v. Roberts*, 3 Bing. N. C. 835; *Jones v. Littler*, 7 Mees. & W. 423; Starkie, Slander & Libel, 118; 1 New Lead. Cas. 124; *Sanderson v. Caldwell*, 45 N. Y. 405, 6 Am. Rep. 105.

§ 559. **The Term "Publication" Defined.**—"To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself." N. Y. Penal Code, § 245.

This may be effected in criminal law by merely sending a letter to the prosecutor couched in such terms as tend to incite a breach of the peace. In civil cases a publication may run to some third person and this fact must be shown. In criminal prosecutions, however, this rule is not strictly enforced. Odgers, Libel & Slander, 432; Heard, Libel & Slander, § 264.

Where a writer of a letter, containing libelous matter, reads the same aloud to a stranger, it is a publication. When a charge, in a written publication, is equivocal, the construction of it is a question for the jury. When the writing complained of as libelous, is plain and unambiguous, the question, in a civil action, whether it be a libel or not, is a question of law. *Snyder v. Andrews*, 6 Barb. 43.

§ 560. **Publication, how Proved.**—The publication of a libel by the defendant may be proved by evidence that he distributed it with his own hand, or maliciously exposed its contents, or read or sung it in the presence of others; or, if it were a picture, or a

sign, that he painted it, or if it were done by any other symbol or parade, that he took part in it, for the purpose of exposing the plaintiff to contempt and ridicule. But to show a copy of a caricature to an individual privately, and upon request, is not a publication. Nor is the porter guilty of publishing, who delivers parcels containing libels, if he is ignorant of their contents. So, if one sells a few copies of a periodical, in which, among other things, the libel is contained, it is still a question for the jury, whether he knew what he was selling. If the libel was published in a newspaper, evidence that copies of the paper containing it were gratuitously circulated in the plaintiff's neighborhood, though they be not shown to have been sent by the defendant who was the publisher, is admissible to show the extent of the circulation of the paper, and the consequent injury to the plaintiff. 2 Greenl. Ev. § 415, citing *De Libellis Famosis*, 5 Coke, 125; *Lambe's Case*, 9 Coke, 59; *Johnson v. Hudson*, 7 Ad. & El. 233; *Rex v. Pearce*, Peake, 75; *Smith v. Wood*, 3 Campb. 323; *Day v. Bream*, 2 Mood. & R. 54; *Chubb v. Flannagan*, 6 Car. & P. 431; *Gathercole v. Miall*, 15 Mees. & W. 319, 10 Jur. 337; *Barrows v. Carpenter*, 11 Cush. 456.

In an action for libel it is a sufficient allegation of its publication by the defendant, that he was the proprietor of a newspaper in which it was published. The statement that the words published are a libel is a sufficient allegation of falsehood and malice. Where the publication is not privileged, nor capable of an innocent construction, it is the duty of the judge to charge that it is libelous. The rule that in all prosecutions for libel, the jury have the right to determine the law and the fact, relates to criminal proceedings only. *Hunt v. Bennett*, 19 N. Y. 173.

§ 561. **What the Indictment must Show.**—It was long since held that an indictment must show on its face that the libel was written or printed. 2 Archb. Crim. Pr. & Pl. (7th ed.) 223, 224. It is the rule that, where an exception is stated in the statute defining the offense, the indictment must show that the case is not within the exception. *People v. Brown*, 6 Park. Crim. Rep. 666. In *Jefferson v. People*, 101 N. Y. 19, this rule is re-stated; but it was held not to be applicable to the indictment in that case. In *Harris v. White*, 81 N. Y. 532, it was held that, where the exception is contained in the enacting clause, the indictment must negative the exception. There are no exceptions

to a rule that an indictment upon a statute must state all the facts and circumstances which constitute the statutory offense, so as to bring the accused perfectly within the provisions of the statute. *People v. Allen*, 5 Denio, 76; *People v. Taylor*, 3 Denio, 91; *People v. Burns*, 53 Hun, 274; *People v. Dumar*, 106 N. Y. 505; *Phelps v. People*, 72 N. Y. 349. Even in an action to recover damages for fraud it is the established rule that, where the proof is equally consistent with guilt or innocence, there must be a verdict for the defendant. *Morris v. Talcott*, 96 N. Y. 100. It is also settled that a party in pleading must clearly state his cause of action or defense; and, when a statement in a pleading is susceptible of two meanings, the one most unfavorable to the pleader must be adopted. *Clark v. Dillon*, 97 N. Y. 370. In criminal cases it is the universal rule that, where the indictment will admit of a construction in favor of innocence, it should be adopted. This doctrine is illustrated in *People v. Standish*, 6 Park. Crim. Rep. 111. In that case the defendant was indicted for illegal voting. It was alleged generally that he, "not then and there being a qualified voter," did vote, etc. The particular disqualification under which he rested was not alleged. It was proven upon the trial that the defendant made a bet, which under the statute disqualified him. The court held that the particular disqualification should have been alleged in the indictment. "Those facts which give character to the act, and which render it criminal, should be alleged in the indictment, otherwise the great object of pleading—that of informing the party what he is called upon to answer—will be defeated."

An indictment for a criminal libel cannot be sustained if the prosecutor or libelee, in order to sustain a civil action for the offense, must allege special damages.

§ 562. **Outline of Plaintiff's Proofs.**—"The natural order of the proofs in actions for defamation on the part of the plaintiff, where the general issue has been pleaded, is:

- "(1) Plaintiff's special character and extrinsic matter.
- "(2) Publication of the defamatory matter.
- "(3) The colloquium and innuendoes.
- "(4) Malice.
- "(5) Damage.

Where the words are actionable only by reason of the plaintiff's holding an office or exercising a profession or trade, the plaintiff

must prove that he held such office or exercised such profession or trade at the date of publication, and that the words complained of were spoken of him in that capacity." Newell, *Defamation, Slander & Libel*, 751.

Upon a recent trial, plaintiff was permitted to prove, under objection and exception, the nature of his business, and that he was a married man. Held, no error; and this proof was competent, not to show special damages, as none had been alleged, but as bearing upon the hurtful tendency of the libel and the general damage. *Morey v. Morning Journal Asso.* 9 L. R. A. 621, 123 N. Y. 207.

Repetition of slanderous charge prior to the commencement of the suit may be proven to show motive. *Root v. Lowndes*, 6 Hill, 518, 41 Am. Dec. 762; *Johnson v. Brown*, 57 Barb. 118; *Bassell v. Elmore*, 48 N. Y. 561; *Gray v. Nellis*, 6 How. Pr. 290; *Inman v. Foster*, 8 Wend. 602; *Distin v. Rose*, 69 N. Y. 122; *Clapp v. Devlin*, 3 Jones & S. 170; *Flanders v. Groff*, 25 Hun, 553; *Titus v. Sumner*, 44 N. Y. 266; *Miller v. Kerr*, 2 McCord, L. 285, 13 Am. Dec. 722.

There is a conflict of authority as to whether repetitions subsequent to the commencement of the suit may be shown. In addition to the authorities above cited, see *Frazer v. McCloskey*, 60 N. Y. 337, 19 Am. Rep. 193; *Distin v. Rose*, 69 N. Y. 122; *Storck v. Buffalo German R. Printing Asso.* 22 Alb. L. J. 135; *Johnson v. Brown*, 57 Barb. 118; *Miller v. Kerr*, 2 McCord L. 285, 13 Am. Dec. 722, 1 Whart. Crim. Ev. p. 44, § 32; Abbott, Trial Brief, 666; *Kennedy v. Gifford*, 19 Wend. 296.

On a trial the witness was asked on behalf of the people, "When you read this article did you recognize its application or any particular individual?" He answered, "I did." Then he was asked, "Who was the person that you recognized that this article referred to?" and he answered "Leo Oppenheim." This evidence was improper. It was for the people to show facts from which the jury might infer that Oppenheim was the person intended by defendant. The testimony of witnesses that they recognized Oppenheim as referred to, was only the statement of their opinion. This matter was not one for experts. Their opinion must have been based upon facts known to them. They should have testified only to such facts. If this kind of testimony were proper, then the defendant could have called witnesses to testify that they

did not recognize Oppenheim as the person referred to. But such testimony would be plainly improper. This principle is distinctly decided in *Van Vechten v. Hopkins*, 5 Johns. 211, 4 Am. Dec. 339; *Gibson v. Williams*, 4 Wend. 320; *Maynard v. Beardsley*, 7 Wend. 561, 22 Am. Dec. 595; *Weed v. Bibbins*, 32 Barb. 315, and by implication in *Wright v. Page*, 36 Barb. 441; *People v. Parr*, 5 N. Y. Crim. Rep. 34.

§ 563. **A Restriction upon Plaintiff's Evidence Noted.**—"The plaintiff should never be permitted to give in evidence words which might be the subject of another action. *Root v. Lowndes*, 6 Hill, 518, 41 Am. Dec. 762, per Bronson, *J.*; *DeFries v. Davies*, 7 Car. & P. 112, per Tindal, *J.* The reason is obvious; the defendant might be compelled to pay damages twice for the same injury. In the present case, the words allowed to be proven, being actionable *per se*, and having been spoken after the commencement of the action, a second action would have been clearly maintainable for them. They were spoken in September, 1871, and the trial was in September, 1872. In *Keenholts v. Becker*, 3 Denio, 346, it was expressly adjudicated that words spoken after the commencement of the action were not admissible to aggravate the damages; and we see no reason to question the correctness of that decision." Rapallo, *J.*, in *Frazer v. McCloskey*, 60 N. Y. 338, 19 Am. Rep. 193.

§ 564. **Evidence in Aggravation of Damages.**—The violence of the language, the nature of the imputation conveyed and the fact that the defamation was deliberate and malicious will aggravate the damages. All the circumstances attending the publication may, therefore, be given in evidence, and any previous transaction between the plaintiff and the defendant which has any direct bearing on the subject-matter of the action, or is a necessary part of the history of the case; the rank or position in society of the parties; that the attack was entirely unprovoked; that defendant could easily have ascertained that the charge he made was false; and evidence may be given to show that the defendant was culpably reckless or grossly negligent in the matter; the mode, the extent and the long continuance of publication. Such evidence is admissible with a view to damages, although the publication has been admitted in the pleadings. The defendant's subsequent conduct may aggravate the damages, as if he has refused to listen to any explanation or to retract the charge he

had made. *Lea v. Robertson*, 1 Stew. (Ala.) 138; *Gorman v. Sutton*, 32 Pa. 247; *Fero v. Ruscoe*, 4 N. Y. 162. Newell, Defamation, Slander & Libel, 785.

§ 565. **Malice as an Element, Presumptions as to.**—Malice is a necessary ingredient of the offense; but it is not necessary to render an act malicious that the party be actuated by a feeling of hatred or ill-will, or that he pursue or entertain any general bad purpose or design. Express malice may be shown by other libels not materially different; and untruthfulness and other circumstances raise an inference of express malice. It is a question of fact to be submitted to the jury. The mere fact of publication shows malice. Malice in a legal sense means a wrongful act done intentionally, without just cause or excuse. *Desty*, Am. Crim. L. § 140 *b.*, citing *Com. v. Snelling*, 32 Mass. 337; *Com. v. Bonner*, 9 Met. 410; *Com. v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214. See 2 Whart. Am. Crim. L. (8th ed.) § 1648; *Com. v. Harmon*, 2 Gray, 289; *McCullough v. McIntee*, 13 U. C. C. P. 441; *White v. Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591; *Wheeler v. Nesbitt*, 65 U. S. 24 How. 544, 16 L. ed. 765; *Bromage v. Prosser*, 4 Barn. & C. 247; *Fairman v. Ives*, 1 Dowl. & R. 255; *Thompson v. Shackell*, 1 Mood. & M. 187; *Maynard v. Firemans Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672; *Reg. v. Gathercole*, 2 Lew. C. C. 237, *ante*, § 8 *a.*

The law not only imputes malice to the defendant, but presumes that damages have been sustained by the plaintiff in consequence of the unlawful act of the defendant.

The plaintiff cannot, by innuendoes, extend the meaning of the words beyond what is justified by the words themselves, and the extrinsic facts with which they are connected. And when, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application is made. *Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105.

"A publication . . . is to be deemed malicious, if no justification or excuse therefor is shown. The publication is justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. The publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs,

or upon a thing which the proprietor thereof offers or explains to the public." N. Y. Penal Code, § 244.

Presumption of malice can only arise when the publication, on its face, is capable of conveying an injurious effect. Every man is presumed to foresee and intend all the mischievous consequences that may justly be expected to flow from his voluntary acts. But the cases of constructive malice are exclusively such as involve words capable of bearing in themselves a libelous meaning. The law in such cases reasonably presumes no more than this, and when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown, by averment and proof, to have existed in the breast of the defendant at the time of publication. *Knickerbocker L. Ins. Co. v. Ecclesine*, 6 Abb. Pr. N. S. 30.

§ 566. **Privileged Communications.** — The occasion that makes a communication privileged is when one has an interest in a matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance. *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby*, 46 N. Y. 431; *Sunderlin v. Bradstreet*, 46 N. Y. 191, 7 Am. Rep. 322. And, in a qualified way, the occasion exists when there has been put forth a publication of general public interest, or the publication thus made in itself is one to which public interest has been invited. Then there is a right to make comment upon that publication. And like to this are the acts and conduct of public functionaries, and, of course, their official productions, when made public by themselves or in the due course of the public business. *Hamilton v. Eno*, 81 N. Y. 116.

"A communication made to a person entitled to, or interested in the communication, by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication." N. Y. Penal Code, § 253.

The general rule is that in the case of a libelous publication the law implies malice and infers some damage. What are called

privileged communications are exceptions to this rule. Such communications are divided into several classes, generally formulated thus: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & Bl. 344, and has been generally approved by judges and text-writers since. In *Toogood v. Spyring*, 1 Crompt. M. & R. 181, an earlier case, it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned," and that statement of the rule was approved by Folger, J., in *Klinck v. Colby*, 46 N. Y. 427, and in *Hamilton v. Eno*, 81 N. Y. 116. In *White v. Nicholls*, 44 U. S. 3 How. 266, 291, 11 L. ed. 591, 602, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it from that just implication from which the general law is deduced."

Where a communication is privileged on its face, plaintiff must show both malice and want of probable cause. *Streety v. Wood*, 15 Barb. 105.

The legend "private and confidential" above the caption of a letter, or the word "personal" or words of similar import will not, as matter of law, impart the status of privilege to the writing unless the evidence shows some relationship between the parties which may justly be regarded as confidential. *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418. See *Byam v. Collins*, 2 L. R. A. 129, 111 N. Y. 143.

This principle applies to other cases of the same nature, and is meant to protect the communications of business and the necessary confidence of man in man, as where one employed by a sheriff to ascertain and inform him of the facts relating to an interference

with a levy upon certain cattle, wrote a letter charging the plaintiff with feloniously taking them (*Washburn v. Cooke*, 3 Denio, 110) or where, at the request of the father, a person made inquiry as to the character of his daughter's husband. *Atwill v. Mackintosh*, 120 Mass. 177. In each instance the report if made in good faith, and reasonably believed true, was held to be privileged. *Atwill v. Mackintosh*, *supra*. So it is said to extend to the confidential communications of friendship (Holt, Libel, 235) and will undoubtedly include every case where in the discharge of any legal, natural, or social obligation, the defendant states what he honestly believes the plaintiff's character to be, whatever the charges may be which he thus imputes to him. Thus in *McDougall v. Claridge*, 1 Campb. 267, it was held that a letter written confidentially concerning a solicitor, and under an impression that its statements were well founded, could not be the subject of an action; and in *Hewser v. Downson*, mentioned in Buller's Nisi Prius, page 8, where the defendant said "in confidence and friendship, by way of warning," to one about dealing with the plaintiff, words affecting his credit, no action would lie because the manner of speaking repelled the idea of malice. In *White v. Nicholls*, 44 U. S. 3 How. 286, 11 L. ed. 600, Justice Daniel enumerates among such communications, "words spoken in confidence and friendship as a caution," and applying the same principle to specific cases, it is laid down in a recent work on this subject (Odgers, Libel & Slander, 210) that a father, guardian or intimate friend may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor, though under the same circumstances a stranger could not do so. *Byam v. Collins*, 2 L. R. A. 129, 111 N. Y. 143.

In an action for libel it is for the court to determine whether the alleged libel was a privileged communication; but the question of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury. The rule is the same where the alleged libelous charge is made against a public officer as such. *Hamilton v. Eno*, 81 N. Y. 116.

§ 567. **Rules as to Justification.**—When one who is sued for defamation deliberately reaffirms the slander, and puts it on the records of the court by way of justification, if he fail to establish the truth of his plea, he has done the plaintiff a new injury, which may properly be regarded as an aggravation of the original

wrong. It is said that the attempt to justify may be made in good faith, or the honest belief that the plaintiff is guilty of the matter laid to his charge. That may be so, but the injury to the plaintiff is not diminished by the mistaken belief of the defendant. And when a man is called into court for charging another with a crime, he ought to pause and examine before he repeats the charge, and places it on record; and if he makes a mistake in such a matter, it should be at his peril, and not at the peril of the injured party.

The justification must be as broad as the charge; and if the defendant fails in an attempt to prove it true, he is entitled to no benefit from the evidence which may have tended in that direction. There is no such thing as a half-way justification. When several distinct things are charged, the defendant may justify as to one, though he may not be able to do so as to all; but as to any one charge, the justification will either be everything or nothing. *Fero v. Ruscoe*, 4 N. Y. 162.

A newspaper article published against the character of the person addressed, and which is referred to in a "threatening letter", is admissible as tending to explain the reason, motive, and the object of the writer of the letter. *People v. Tonielli*, 81 Cal. 275.

§ 568. **Repetition of a Slander.**—The repetition of the slander to a third person without any interest existing to call for the communication, is not admissible; but when the slander is repeated to be connected with instructions injurious to the plaintiff, and necessarily connected with the business or interests of the man to whom the slander was spoken, it may be used for the purpose of showing damage. *Olmsted v. Brown*, 12 Barb. 657; *Fowles v. Bowen*, 30 N. Y. 22.

§ 569. **Malice, how Proved.**—Although evidence is admissible to prove the general character of the plaintiff to be bad, yet no mere reports or rumors, not amounting to proof of general character, nor information obtained by the defendant from others as to the truth of the charge, unless accompanied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice. This necessarily reduces the defendant to the proof of facts and circumstances known to him at the time of making the charge, having a tendency to induce a belief of its truth, as the only means of showing a want of

malice. *Bush v. Prosser*, 11 N. Y. 347. In this same case, Selden, *J.*, says: "The defendant has the right to prove the absence of malice in mitigation of the verdict, and to do this it is indispensable to prove that he believed, and had some reason to believe, the charge to be true when it was made. There are but two conceivable modes of doing it, one by proving that he received such information from others as induced him to believe the charge to be true; the other by showing the existence of facts within his knowledge calculated to produce a belief." In *Cooper v. Barber*, 24 Wend. 105, Bronson, *J.*, says: "Facts and circumstances which tend to disprove malice, by showing that the defendant, though mistaken, believed the charge true when it was made, may be given in evidence in mitigation of damages." See also *Bisbey v. Shaw*, 12 N. Y. 67.

§ 570. **Evidence of Intent Material.**—Where an act innocent in itself, becomes criminal, when done with a particular intent, that intent is the material fact to constitute the crime. *Rex v. Withers*, 3 T. R. 429. And I think there cannot be a doubt, that the mere publication of a paper is not, *per se*, criminal; for otherwise, the copying of the indictment by the clerk, or writing a friendly and admonitory letter to the father, on the vices of his son, would be criminal. The intention of the publisher, and every circumstance attending the act, must therefore be cognizable by the jury as questions of fact. And if they are satisfied that the publication is innocent; that it has no mischievous or evil tendency; that the mind of the writer was not in fault; that the publication was inadvertent, or from any other cause, was no libel, how can they conscientiously pronounce the defendant guilty from the mere fact of publication? *People v. Croswell*, 3 Johns. Cas. 364.

§ 571. **Accused may Swear to his Intent.**—To constitute a crime, there must in all cases be a criminal intent. *Reg. v. Mullins*, 3 Cox, C. C. 526; *People v. Farrell*, 30 Cal. 316; *St. Charles v. O'Mailey*, 18 Ill. 407; *Campbell v. Com.* 84 Pa. 197; *Genet v. Mitchell*, 7 Johns. 130; *People v. Sullivan*, 4 N. Y. Crim. Rep. 197. At one time it was looked upon as doubtful whether the party accused could swear directly as to his intent when the question was involved in the issue. In *People v. Baker*, 96 N. Y. 340, where the indictment was for obtaining property under false pretenses, the defendant was asked by his counsel to state what

was his intention in receiving the \$575. This was objected to, excluded, and held error. The same principle is decided in *McKown v. Hunter*, 30 N. Y. 625, was a case for malicious prosecution. Another illustration is found in *Kerrains v. People*, 60 N. Y. 228, 14 Am. Rep. 158, which was the case of an assault with a deadly weapon with intent to kill. The question in this case was: "What was your intention in taking the axe from the shed?" It was rejected. The court, on appeal, held this to be error, and reversed the judgment.

§ 572. **Fair Criticism Allowed.**—Where the evidence shows that the libelous matters complained of were in the way of comments openly made upon the acts and conduct of public officers in matters of public interest and importance, and if they are within the limits of a fair and honest criticism, and are not inspired by actual malice they are privileged by the occasion, and, therefore, not libelous. Folkard, Starkie, Slander & Libel (4th Eng. ed.) p. 311, § 246. The existence of the privilege does not depend upon the truth of the statements made. Folkard, Starkie, Slander & Libel, p. 319, § 256; *King v. Root*, 4 Wend. 113; *Clark v. Molyneaux*, L. R. 3 Q. B. Div. 247. The only limit to the privilege, is that the comments shall be within the limits of a fair and honest criticism and without actual malice. *Campbell v. Spottiswoode*, 32 L. J. Q. B. 185; *Cooper v. Lawson*, 8 Ad. & El. 746; *Wason v. Walter*, 38 L. J. Q. B. 34; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Turnbull v. Bird*, 2 Fost. & F. 508; *Eastwood v. Holmes*, 1 Fost. & F. 349; *Davis v. Duncan*, L. R. 9 C. P. 396; *Spill v. Maule*, L. R. 4 Exch. 232; *Klinck v. Colby*, 46 N. Y. 427; *Clark v. Molyneaux*, *supra*. The question of malice is exclusively for the jury whenever (as in the case of privilege) express malice—not legal malice—must be proved. *Clark v. Molyneaux* and *Klinck v. Colby*, *supra*.

In criticising the productions of an author, the laws allows considerable latitude. The interests of literature and science require that the productions of authors shall be subject to fair criticism; that even some animadversion may be permitted, unless it appears that the critic, under the pretext of reviewing his book, takes an opportunity of attacking the character of the author, and of holding him up as an object of ridicule, hatred, or contempt. In other words the critic may say what he pleases of the literary merits or demerits of the published production of an author; but

with respect to his personal rights, relating to his reputation, the critic has no more privilege than any other person not assuming the business of criticism. He may say, as Burke said of the style of Gibbon, that it is execrable; but we cannot say that the author himself is execrable, or that he is personally affected or absurd or wayward.

He may say of the orator who uses excessive gesticulation and vociferation, mistaking extravagant action and verbosity for eloquence, that he has all the contortions, without any of the inspiration of the Sybil. He can say of the player that he mouths his speech, as many players do, or that "he saws the air too much with his hand," or that he "tears a passion to tatters, to very rags, to split the ears of the groundlings."

The critic can call a painting a daub and an abortion, but he cannot call the painter himself a low, discreditable pretender and an abortion. The most comprehensive freedom in animadverting upon the productions and actions of public men is essential to the very existence of civil and political liberty, and to the progress of civilization, and I heartily say with Lord Ellenborough, in *Tabart v. Tipper*, 1 Campb. 350: "Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure what is hostile to morality."

"A fair and candid criticism, though severe, of a literary work, exposing its faults, is privileged; but if the criticism is made the vehicle of personal calumny of the author, aside from the legitimate purpose of criticism, it becomes libelous. So of a communication made in good faith by a person in the discharge of some private duty, legal or moral, or in the conduct of his own affairs or in matters in which he is interested; such as a warning to a relative not to marry a certain person for special reasons affecting his character; or a protest by inhabitants of a school district against the character of an applicant to teach; or a complaint to a superior against an inferior officer, in order to obtain redress; or an account of the character of a servant in answer to proper inquiry; or a report of a servant's conduct to his master; or a true

statement in defense of one's own character and interests, or to enforce the rules of a society, or to aid in the exposure or detection of crime, or to protect the public or a friend from being swindled or otherwise injured. Such communications, although to some extent false, are privileged if made without malice and for justifiable ends." Browne, Crim. L. 78, citing *Wright v. Woodgate*, 2 Crompt. M. & R. 573.

The mere theoretical discussion of abstract propositions relating to the science of government, or to questions of political economy or individual rights are beyond the pale of criminal cognizance. It is only where such discussion assumes an intemperate or inflammatory aspect, directly menaces the peace and good order of society, or incites the populace to riot and revolution that restraint may be imposed in the way of criminal indictment.

The great Homestead riot cases in Pennsylvania during the summer of 1892 afford instructive reading as elucidative of this topic, also of the far wider questions involved in the crime of treason.

§ 573. **Rule as to Editors and Reporters.**—"A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein, of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report.

"Every editor, or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him so soon as known." N. Y. Penal Code, §§ 246, 247.

These provisions, although cited from a New York statute, are quite general throughout the American Union.

§ 574. **Miscellaneous Authorities on the Subject.**—In criminal prosecutions for libel, the reasonable doctrine is, that some

connection must be shown between the publication complained of, and the publications admitted in evidence to prove actual malice; but if these tend to show ill will toward the person concerning whom the publication complained of is made, and are of such a nature as to indicate a persistent disposition of hatred or ill will toward him, or if they appear to be a part of a settled purpose to bring him into public hatred, contempt or ridicule, and are sufficiently near in time to afford a natural inference that the same state of mind existed when the publication complained of was made, they are admissible, although they are subsequent to the publication complained of, and do not expressly refer to it. *Eldridge v. State*, 27 Fla. 162.

The publisher of a libel cannot escape liability by veiling a calumny under artful or ambiguous phrases, or by indirectly charging that which would be slanderous, if imputed in direct and undisguised language. *Sanderson v. Caldwell*, 45 N. Y. 401, 6 Am. Rep. 105.

"Where the terms of the communication are indirect, the imputation of an act committed may be inferred, where the defendant expresses a suspicion or opinion, or institutes a comparison, or delivers the words as matter of hearsay, or by way of interrogation or answer, or exclamation, or uses disjunctive or adjective words, or speaks ironically; or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it." 1 Stark. Slander & Libel, 63.

"But where the name of the plaintiff is not stated, or where a portion only of his name is stated, then if the application of the matter to the plaintiff is denied, the burden is upon him to show its application. To do this he must prove facts which show such application; he cannot prove the application directly, by asking a witness who has read the application whom he understood to be intended." Townshend, Slander & Libel, § 375 a.

Section 724 of Moore's Criminal Law, contains many illustrations of what the courts construe as criminal libel. Obviously, any evidence calculated to establish the publication of any of the enumerated acts should be regarded as relevant. The section referred to, is as follows: "An indictment lies for publishing words which contain that sort of imputation which is calculated to vilify a man and bring him into hatred, contempt or ridicule, though the words impute no punishable crime." Archb. Crim.

Pr. & Pl. 204; *State v. Farley*, 4 McCord, L. 317; *Com. v. Chapman*, 13 Met. 68; *State v. Henderson*, 1 Rich. L. 179; *Rex v. Pownell*, 1 W. Kel. 58; *Steele v. Southwick*, 9 Johns. 214. Thus to write that a man is a swindler or a hypocrite, or an itchy old toad (2 Archb. Crim. Pr. & Pl. 204; *Thorley v. Kerry*, 4 Taunt. 355) or a drunkard (*Giles v. State*, 6 Ga. 276) or a cuckold and a story (*Giles v. State, supra*) or is insane (*Rex v. Harvey*, 2 Barn. & C. 257; *Southworth v. Stevens*, 10 Johns. 443) or that a woman has been guilty of fornication (*Reg. v. Langley*, 3 Salk. 190; *Rex v. Weltje*, 2 Campb. 142; and see *State v. Avery*, 7 Conn. 267, 18 Am. Dec. 105) is libelous and indictable. Barbour, Crim. L. 232. So it is indictable to charge a man with a gross want of feeling (*Weaver v. Lloyd*, 4 Dowl. & R. 230) or with wanting discretion (2 Archb. Crim. Pr. & Pl. 204) or with having committed any crime. Whart. Am. Crim. L. § 2527; *State v. White*, 29 N. C. 180; *Hillhouse v. Dunning*, 6 Conn. 391; *Walker v. Winn*, 8 Mass. 248. It is libelous to write concerning a man, 'I look upon him as a rascal and have watched him for many years' (*Williams v. Karnes*, 4 Humph. 9) or that 'he is thought no more of than a thief or a counterfeiter.' *Nelson v. Musgrave*, 10 Mo. 648."

CHAPTER LXIV.

CRIMINAL CONSPIRACY.

§ 575. *What Constitutes Conspiracy.*

576. *One Member of the Confederacy may be Convicted.*

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578. *Declarations of Co-conspirators Competent.*

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583. *Rule from the "Star Route" Case as to Reasonable Doubt.*

§ 575. **What Constitutes Conspiracy.**—"If two or more persons conspire, either

"1. To commit a crime; or

"2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or

"3. Falsely to institute or maintain an action or special proceeding; or

"4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or

"5. To prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or

"6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws.

"Each of them is guilty of a misdemeanor." N. Y. Penal Code, chap. 8, § 168.

There are strong indications that originally the definition of conspiracy did not include anything more than confederacies to charge falsely a person with criminality. Thus Lord Coke describes the offense as "a consultation and agreement between two or more, to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men." Blackstone also seems to regard the offense to be confined to a malicious accusation. 4 Bl. Com. 136. There are several cases in the Year Books that favor the same limitation. And, in fact, this species of indictment was the remedy for the same wrong, considered in its criminal aspect, for which an action for a malicious prosecution was the remedy, considered in its civil aspect. It is much in this light that the subject is treated in Jacob's Law Dictionary, title *Conspiracy*, and in 1 Hawk. P. C. chap. 72, § 2. But the doctrine was soon expanded beyond its limit, and, among other cases, it was held that although no indictment had been found, or even though no complaint had been laid before a magistrate, and the only object appearing was to destroy the reputation of an individual, a prosecution for conspiracy could be maintained. This was the ruling by Lord Mansfield in the case of *Rex v. Parsons*, 1 W. Bl. 392; *State v. Hickling*, 41 N. J. L. 208.

A conspiracy being an agreement to commit a criminal or unlawful act, the criminality must exist either in the principal act (the end) or the means by which it is to be accomplished. The information must therefore set out directly, and not by way of inference, the criminal or unlawful act, either in the end or means. *State v. Keach*, 40 Vt. 113; *State v. Crowley*, 41 Wis. 271, 22 Am. Rep. 719; *Com. v. Shedd*, 7 Cush. 514; *State v. Jones*, 13 Iowa, 270; 1 Bennett & Heard, Lead. Crim. Cas. 264 and notes; *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *State v. Roberts*, 34 Me. 320; *State v. Hewitt*, 31 Me. 396; *Wark v. Willard*, 15 N. H. 396; *Lambert v. People*, 9 Cow. 578; *Hartman v. Com.* 5 Barr. 60; *United States v. Cruikshank*, 92 U. S. 542-558, 23 L. ed. 588-593; 1 Archb. Crim. Pr. & Pl. 283, note 1; *State v. Wilson*, 30 Conn. 504.

At first to bring popular leaders to the block, the law of con-

spiracy has in later times been invoked to suppress combinations among workmen to better their condition. Many of the most eminent judges in this country have looked upon it with disapproval, and expressed a determination to restrict rather than extend it. See 2 Stephen, Dig. Crim. L. 227, 229; *State v. Keach*, 40 Vt. 113; *State v. Jones*, 13 Iowa, 270; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Com. v. Shedd*, 7 Cush. 514.

§ 576. **One Member of the Confederacy may be Convicted.**—While it takes at least two to make a conspiracy, it is not necessary to make even two persons defendants. One alone may be convicted upon proof that there was a criminal conspiracy of which he was a member. This is elementary law. 2 Bishop, Crim. Proc. § 186; 3 Whart. Am. Crim. L. (6th ed.) §§ 2340, 2344, 2346; *State v. Adams*, 1 Houst. Crim. Cas. 361; *Com. v. Irwin*, 8 Phila. 380. The doctrine of criminal conspiracy rests upon the obvious proposition that the power of many for mischief against the one is so great that the state should protect the one. *State v. Rowley*, 12 Conn. 112; *Reg. v. Duffield*, 5 Cox, C. C. 432.

§ 577. **Proof under Indictment Governed by same Rules as in other Cases.**—An indictment for a conspiracy stands on precisely the same footing with an indictment for any other crime. There is no special virtue in the term “conspiracy,” such as that it should establish a man’s guilt by evidence of the acts of other men. Wright, Criminal Conspiracies, 69, 71; *People v. Thoms*, 3 Park. Crim. Rep. 256; *People v. Courtney*, 1 N. Y. Crim. Rep. 64; *Cuyler v. McCartney*, 40 N. Y. 221; *Ormsby v. People*, 53 N. Y. 472; *Com. v. Work*, 43 Phila. Leg. Int. 57; *Johnson v. Miller*, 63 Iowa, 529, 50 Am. Rep. 758; *United States v. Jones*, 3 Wash. C. C. 209; *Swan v. Com.* 104 Pa. 218.

§ 578. **Declarations of Co-conspirators Competent.**—Can declarations of one of the alleged co-conspirators, made subsequent to the abandonment or accomplishment of the conspiracy be given in evidence as against a co-conspirator?

The general rule upon this subject has been frequently considered by the New York court of appeals in some quite recent cases.

a. **New York Decisions in Reference to.**—In *McCarney v. People*, 83 N. Y. 417, 38 Am. Rep. 456, in discussing this question, the court says: “It is a rule of stringency that there must be proof of a conspiracy before the declarations of a co-conspira-

tor can be taken against one on trial for that offense. Yet that rule has sometimes been made to yield to the other that the order of proof must yield to the discretion of the court."

In the case of *People v. Davis*, 56 N. Y. 103, the court says: "The general rule is, that when sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against all. But to make the declaration competent it must have been made in furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object, of the conspirators is not competent evidence against the others. We have already seen that the statement in question was a mere narration of what had been done."

In the case of *Stone v. People*, 13 Hun, 265, a deposition by one of the alleged co-conspirators, the deposition having been taken some two or three months after the transaction. The court said: "The deposition of Stone was incompetent as evidence against Black. The evidence was given long after the plaintiffs in error had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone."

b. The Wisconsin Rule.—Wisconsin adopts substantially the same rule in that jurisdiction. The principle is well established that evidence of the acts and declarations of co-conspirators, if made pending the conspiracy, and in furtherance of, or with reference to, the common design, are admissible against all, and it is not necessary that the defendant against whom the act or declaration is sought to be introduced should have been a conspirator at the time the act or declaration took place. If he subsequently joined the conspiracy, he ratified the previous acts of the conspirators, and made such prior acts and declarations in reference to the common object evidence against him. *Holtz v. State*, 76 Wis. 99.

But it is indispensable that there be proof sufficient to establish *prima facie* the fact that a conspiracy existed at the time of the act or declaration sought to be introduced. *Baker v. State*, 80 Wis. 416.

c. Views of Mr. Roscoe.—In Roscoe's Criminal Evidence (5th

Am. ed.) page 414, the learned author, referring to the *Queen's Case*, 2 Brod. & B. 310, says: "The following rules were laid down by the judges: 'We are of opinion, that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participants in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But it is to be observed that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with general evidence of the alleged conspiracy; and if upon such opening it should appear manifest that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.'

d. Other Sustaining Authorities.—But to have the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. 1 Taylor, Ev. p. 542, § 530.

So, on the trial of one of several defendants jointly indicted for an offense, the declaration of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, are admissible when a *prima facie* case of conspiracy has been made. To authorize the admission of such evidence, an express averment in the indictment, of the fact of a conspiracy, is not necessary. *Goins v. State*, 46 Ohio St. 457.

The rule laid down by Mr. East is as follows: "That the conspiracy or agreement among several to act in concert for a particular end must be established by proof and before any evidence

can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." But it is observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. In the case of *Place v. Minster*, 65 N. Y. 105, Mr. Commissioner Dwight, in speaking upon this subject, says: "Nothing can be better settled than the main proposition that the declarations of one alleged conspirator cannot be admitted against his associates unless the conspiracy be established. There is, however, no rule that the conspiracy must be established first in the order of time. Convenience may require that the declaration be admitted provisionally, subject to subsequent proof of the conspiracy. If that is not offered, it should be stricken out. If this discretion is abused, there will be error."

§ 579. Defendant's Guilt must be Established by Evidence of his own Acts.—It is necessary that the defendant's guilt, either as principal or accessory, should be finally established by evidence of his own acts. Wright, Criminal Conspiracies, 69, 71; *People v. Thomas*, 3 Park. Crim. Rep. 256; *People v. Courtney*, 28 Hun, 589; *Cuyler v. McCartney*, 40 N. Y. 221; *Ormsby v. People*, 53 N. Y. 472; *Com. v. Work*, 43 Phila. Legal Int. 57; *Johnson v. Miller*, 63 Iowa, 529; *United States v. Jones*, 3 Wash. C. C. 209; *Swan v. Com.* 104 Pa. 218; Stephen, Dig. Crim. L. art. 39; *Reg. v. Berry*, 4 Fost. & F. 389; *State v. Cox*, 29 Mo. 475; *Clem v. State*, 33 Ind. 418; *Connaughty v. State*, 1 Wis. 159, 60 Am. Dec. 370.

§ 580. Rule as to Criminal Intent.—To make an agreement between two or more parties a criminal conspiracy, it is not enough that the act is prohibited by statute, but the agreement must have been entered into with a criminal intent. *People v. Powell*, 63 N. Y. 88. But to constitute a criminal intent it is not necessary to show an intent to violate the law; the question is,

did the accused intend to do the thing he did do, and was that thing in violation of law. *People v. Grim*, 3 N. Y. Crim. Rep. 317; *Halsted v. State*, 41 N. J. L. 552, 32 Am. Rep. 247; *Fox v. State*, 3 Tex. App. 329, 30 Am. Rep. 144; *Reg. v. Prince*, 13 Moak, Eng. Rep. 385.

§ 581. When Proof of Conspiracy must First be Shown.—

The proof of conspiracy which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact.

“Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause.” 1 Greenl. Ev. § 111.

The rules that the conspiracy must be first established *prima facie* before the acts and declarations of one conspirator can be received in evidence against another, cannot well be enforced “where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts; and, in any case, where such acts and declarations are introduced in evidence and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually existed,—it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations.” *State v. Winner*, 17 Kan. 298.

In many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. Roscoe, Crim. Ev. (7th ed.) 415. “In some peculiar instances, in which it would be difficult to establish the defendant’s privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant’s privity.” Roscoe, Crim. Ev. 414.

§ 582. What may be Shown in Aggravation of the Offense.—

—In *State v. Mayberry*, 48 Me. 218, it was held that if the conspirators carry out the object of conspiracy, that fact may be alleged in aggravation of the offense, and given in evidence to

prove the conspiracy. Though the offense of conspiracy, even where the overt act is committed, is complete before the commission of the overt act, in the sense that nothing more is necessary to constitute the crime, yet the conspiracy must be deemed to continue during the commission of the overt act. *Com. v. Corlies*, 3 Brewst. 575; *State v. Ormiston*, 66 Iowa, 143.

Mere knowledge of a conspiracy without actual participation in it is insufficient to convict. Indeed, such evidence is inadmissible. *People v. Evans*, 90 Ill. 384. But presence at a meeting of the conspirators may be shown as evidence of participation. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

§ 583. **Rule from the "Star Route" Case as to Reasonable Doubt.**—"All crimes are generally more or less difficult to establish; but conspiracies are peculiarly the product of darkness. Conspiracies are very seldom reduced to writing. They are entered into sometimes in a very informal way; generally, in fact, in an informal way. The parties may not come together at all. They may be in different parts of the country. But if, by any means, by telegraph or letter or by dumb show, if any of them are dumb, if by any means whatever, they come to a mutual understanding for the purpose of committing a crime against the government that is a conspiracy, provided it be followed by an overt act. It is said that you ought not to convict men on circumstantial evidence unless it be of the clearest and most absolutely convincing character. The rule in regard to conspiracy, as in regard to all crimes, is that you shall be satisfied in your own mind, beyond a reasonable doubt, of the guilt of the defendants. I do not know that I am capable of making that any clearer. The books contain discourses on the subject, amplifications of that idea, but after all it comes back to the point that every man on the jury should be satisfied of the guilt of the defendants beyond a reasonable doubt. The reasonable doubt ought to be a doubt which arises out of the evidence in the case. It ought not to be conjecture. It ought to be a doubt supported by a reason. There is a difficulty, though. You are twelve men on the jury. Your organs are different, your mental capacities are different, and your powers of observation are different. What may seem to be a reasonable doubt to one may not seem so to another. But that is a difficulty which cannot be avoided as long as twelve men have to pass upon the question of the liberty of the citizen. Each man ought to be satisfied

in that sense. The jury ought to be careful to see that the doubt arises out of the evidence and is not a mere conjecture. A man is seen upon the street to strike another upon the head and fell him to the ground by a blow with a bludgeon. The stricken man's skull is cracked and he dies. It is possible that he might have had a convenient apoplectic fit and died from it; but if there is no evidence of apoplexy and no evidence that that caused his death and the blow was sufficient to cause his death it would be folly, weakness, and an unreasonable ground that the man might have died of apoplexy." *United States v. Dorsey*, 3 Star Route Trials (Government ed.) 3188.

CHAPTER LXV.

EVIDENCE IN TRIALS BY COURTS-MARTIAL.

- § 584. *Courts-martial Entertain Limited Jurisdiction.*
- 585. *Rules of Evidence Governing.*
- 586. *Arbitrary Nature of the Rules.*
- 587. *Justified only by Military Necessity.*
- 588. *Review of the Celebrated Milligan Case.*
- 589. *Extract from De Hart's Military Law.*
- 590. *Power of these Courts to Originate Evidence.*
- 591. *Functions of the Judge Advocate.*
- 592. *Evidence in Support of the Averments of the Charge.*
- 593. *Liberal Rules as to Defensive Evidence.*
- 594. *Rule as to Counsel.*
- 595. *Recalling Witnesses.*
- 596. *Evidence of the Record on Appeal.*
- 597. *Partial Review of Miscellaneous Authorities.*

§ 584. Courts-martial Entertain Limited Jurisdiction.—

Courts-martial and delinquency courts are tribunals of special and limited powers, having jurisdiction only of offenses against military discipline committed by persons belonging to the particular branch of the military organization for which such courts are organized.

The military courts are courts of special, limited—not general—jurisdiction. While the civil courts cannot interfere with the military courts, when acting within their jurisdiction, it is the province of the former to confine the latter strictly to the exercise of their special jurisdiction. *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601. In *Re Bogart*, 2 Sawy. 396, and in *Ex parte Reed*, 100 U. S. 21, 25 L. ed. 538, the court inquired into the fact whether the petitioners were in the naval service, at the time when the alleged offense was committed, and, on finding that they were, held, that the courts were proceeding within their appropriate jurisdiction, and refused on that ground to interfere. *Re Zimmerman*, 30 Fed. Rep. 176.

Military law proper is that branch of the public law which is enacted or ordained for the government exclusively of the mili-

tary state, and is operative equally in peace and in war. 1 Winthrop, *Military Law*, 4.

Military law is that portion of the law of the land designed for the government of a particular class of persons, and administered by special tribunals. It is superinduced to the ordinary law for the purpose of regulating the citizen in his character of soldier; and although military offenses are not cognizable under the common law jurisdiction of the United States, yet the articles of war clearly recognize the superiority of the civil over the military authority. Benet, *Military Laws & Courts-martial*, 1.

§ 585. **Rules of Evidence Governing.**—While Congress has authorized courts-martial, established their composition, jurisdiction, and rules of procedure, it has never prescribed the rules of evidence which shall govern their proceedings. Courts-martial, being courts alone of criminal jurisdiction, must therefore adhere to the rules of evidence of the United States criminal courts. 2 *Opinions Atty. Gen.* 344; 3 *Greenl. Ev.* § 469.

These rules are the common law rules of evidence in criminal cases, except where Congress has prescribed otherwise. The only other exceptions which are permitted are those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding. 3 *Greenl. Ev.* § 476, cited in *Ives*, *Military Law*, 300.

§ 586. **Arbitrary Nature of the Rules.**—The Duke of Wellington said, in the House of Lords, on the 1st of April, 1851, in reference to the Ceylon rebellion of 1849, "that martial law was neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all."

A military commission derives its powers and authority wholly from martial law; and by that law and military authority only are its proceedings to be judged or reviewed. *Dynes v. Hoover*, 61 U. S. 20 How. 78, 15 L. ed. 843; *Ex parte Vallandigham*, 68 U. S. 1 Wall. 243, 17 L. ed. 589.

Martial law is the will of the commanding officer of an armed force or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief or supreme executive ruler. Speech of the Duke of Wellington, 95 *Hansard*, *Parl. Debates* (3d series),

80, 8 Opinions Atty. Gen. 367; Examination of Major Andre before Board of Officers, 18 Colonial Pamph.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary War, had repeated recourse to military commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the acts of Congress of July 17, 1862, chap. 201, § 5; Mar. 18, 1863, chap. 75, § 36; Resolution No. 18, Mar. 11, 1862; and their jurisdiction over certain offenses is also recognized by these acts.

1 Blackstone's Commentaries, pp. 413, 414, says: "For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law."

Lord Loughborough, delivering the judgment of the King's Bench in *Grant v. Gould*, 2 H. Bl. 69, says:

"Martial law, such as it is described by Hale, and such also, as it is marked by *Mr. Justice* Blackstone, does not exist in England at all. Where martial law is established and prevails in any country, it is of a totally different nature from which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution and which has been for a century totally exploded."

§ 587. **Justified only by Military Necessity.**—The military necessity, which justifies or excuses the exercise of martial law over persons not in the military service, must be an actual, not a fictitious necessity. Martial law, which punishes without legal trial, can only be enforced at a place where war is actually blazing, where the courts are driven out and a legal trial physically impossible. It cannot be continued an hour after this state of things ceases, nor can it be tolerated at one place because the courts are broken up by war or insurrection in another place. Our views on this point are more fully expressed by Sir James Mackintosh, in his great speech on the case of Rev. Jno. Smith, delivered in the House of Commons June 1st, 1824. 3 Mackintosh's Works, 726, 734; Hale, Hist. Com. L. 41-43; 3 Hall, Const.

Hist. of Eng. 350; 1 Hall, Const. Hist. of Eng. 328; 1 Bl. Com. 413; 1 DeLolme, Eng. Const. 265, 266; *Lieut. Frey's Case*, mentioned in 2 DeLolme, Eng. Const. 982, and in McArthur, Military Law; see also London Gazette, 1746, in Congressional Library; Steven, Martial Law Com. 561; Hough, Military Law, 511; Wellington's Opinion of Martial Law, as expressed in the House of Lords in 1851, Hough, Military Law, 515; Hickman, Naval Court-Martial, 85; O'Brien, Am. Military Law, 222, 225, 226; 3 Benton, Abr. Debates, 504; Debate on Jefferson's Application for Suspension of *habeas corpus*, Mackintosh's speech on *Smith's Case*, Mackintosh's Works, 726; Brougham's Speech on same case, Brougham's Speeches. See Review of *Smith's Case*, 40 Edinburgh Review; *Earl of Lancaster's Case*, Attainder Reversed, 1 Edw. III.; Hale, P. C. 499, 500; Petition of Right, 5 Statutes of the Realm, 424; *Goeffrey's Case*, in France Court of Cassation, June 29, 1832; 24 Journal Du Palais, 1218; *Lord McGuire's Case*, 4 How. St. Tr. 654; Prynne's Argument for Prosecution, 690; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281.

§ 588. **Review of the Celebrated Milligan Case.**—"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birth-right of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Con-

stitution and the laws authorized by it, this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, that 'the trial of all crimes, except in case of impeachment, shall be by jury;' and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people, that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified." *Ex parte Milligan*, 71 U. S. 4 Wall. 120, 18 L. ed. 295.

The right of trial by jury is preserved to every one accused of crime, who is not attached to the army, or navy, or militia in actual service. Martial rule can never exist where the courts are

open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281.

The case last above cited must ever be regarded as among the celebrated cases expository of this entire subject. The prosecution was represented by James Speed the Attorney General, Henry Stanbury subsequent in the same position, and by Benjamin F. Butler. The defense was entrusted to Jeremiah S. Black, J. E. McDonald, James A. Garfield and David W. Field. *Chief Justice* Chase announced the order of the court, and *Mr. Justice* Davis delivered the opinion, followed by a more elaborate one from the Chief Justice. *Justices* Nelson, Grier and Clifford dissented. Swayne, Wayne and Miller concurred. Taken together these two opinions together with the briefs of counsel afford very instructive reading upon the somewhat obscured topic of the law.

§ 589. **Extract from De Hart's Military Law.**—"The subject of evidence, which presents so wide a field, to be scrutinized by those who are engaged in the administration of justice, in the ordinary or civil walks of life, is of comparatively limited extent as applied for the purposes of military investigation; and this because in the latter cases there is a greater similarity in the questions to be considered, arising from the absence of those diverse conditions, and complicated circumstances both of law and facts, which distinguish judicial proceedings in the ordinary courts of justice.

"It is unnecessary therefore, that military persons should be possessed of a knowledge of those niceties and distinctions, in regard to evidence, which is so essential to the legal practitioner in his daily business; but as the rules which govern courts-martial are the same as those obtaining in the criminal courts of the land, it is of essential importance that military men should understand the general principles of the law of evidence.

"These are gathered from the past, in the gradual experience of able men, whose lives have been devoted to the science of law, and been conformed by time. They are founded on the 'observations of human conduct, on common life, and living manners,' and are acknowledged as 'rules of law because they are just and reasonable;' and are not, therefore, to be regarded as mere arbitrary dicta, upon the observance of which a formal uniformity may be preserved, or the convenience of the court insured, but as

great moral truths which govern or influence the acts and opinions of men, and are essential to be known and defined for the safety of society." De Hart, *Military Law*, chap. 16, p. 334.

§ 590. **Power of these Courts to Originate Evidence.**—Some question has arisen as to the power of a court-martial to originate evidence; that is, to call witnesses not called by either party. While this places a court-martial somewhat in the light of a prosecutor, yet there may be points which the court desires to have cleared up, and the Judge Advocate General says that it is authorized to call before it to give testimony, witnesses whom neither the prosecution nor the defense have summoned, and this even after both have closed their case. Ives, *Military Law*, 133.

§ 591. **Functions of the Judge Advocate.**—"The judge advocate is the advising and prosecuting officer in military law or before a court-martial.

"He may be the judge advocate general, or a deputy judge advocate. In conducting a trial, he represents the United States, the accused, and the court. The officer highest in rank present is president of the court.

"The officer who may order a court-martial is competent to appoint the judge advocate; the appointment for a regimental or a garrison court-martial is made in the same manner as for a general court-martial.

"Without the order of the court, he may summon necessary witnesses and he may compel the attendance of any person not in the military service. When it is possible, he should send subpoenas through regular military channels. He also conducts the examination of witnesses, observing the established rules of evidence.

"By order of the court he may be assisted by a clerk, preference being given by a soldier.

"At the close of the trial, without delay, he should transmit the proceedings to the officer having authority to confirm the sentence." Anderson, *Law Dict.* title *Judge Advocate*, citing *Regulations of the Army of the United States*, 88, 89, 92 (1881).

§ 592. **Evidence in Support of the Averments of the Charge.**—After all preliminary matters are disposed of and the case is at issue, the judge advocate opens for the prosecution, and introduces evidence to support the averments of the charge. The defendant then presents his witnesses, and the trial is proceeded with in the same manner as in civil tribunals.

The rules of the military law with reference to evidence are founded upon the civil and distinguished from military law; but the military courts are deficient in known and accessible precedents available to decide doubtful questions. In *Whittaker's Case*, Attorney General Brewster said: "As no rules of evidence are specially presented by Congress for the observance of courts-martial, it must be deemed that such courts are contemplated to be governed, in general, by the same rules of evidence which govern the ordinary courts of criminal jurisprudence. These rules are supplied by the common law, excepting, of course, where otherwise provided by statute, in which case the latter prevails." See also *Grant v. Gould*, 2 H. Bl. 69; Am. & Eng. Enc. Law, title *Military Law*.

§ 593. **Liberal Rules as to Defensive Evidence.**—The following remarks from the War Department in reference to the statement of an accused, should be borne in mind by the members of courts-martial, and by parties being tried: "Great latitude is undoubtedly always allowed to an accused in offering his defense. Any argument fairly deducible from the evidence tending to show malice in the prosecution, or to impeach the credit of witnesses may be advanced; but this privilege ought not to be abused, so as to make an argument the vehicle of satire and personal ridicule, and convert a means of defense into a weapon of attack."

"Courts-martial had much better err on the side of liberality towards a prisoner than by endeavoring to solve nice and technical refinements of the law of evidence, assume the risk of injuriously denying him proper latitude for defense." Ives, *Military Law*, 134.

§ 594. **Rule as to Counsel.**—Persons having an interest in the trial cannot insist upon being admitted to act as counsel, or have others do this in their behalf. This was exemplified in the trial of Commander Mackenzie, U. S. N. 1843, who was charged with "murder on board a U. S. vessel on the high seas." On the third day of the trial the judge advocate presented a paper signed by two eminent legal gentlemen, stating that "they had been employed by the relatives of Midshipman Philip Spencer, one of the persons for the murder of whom Commander Mackenzie was then upon trial, to attend the trial and take part therein, by examining and cross-examining the witnesses who might be produced, and

propounding such questions, and offering such suggestions in relation to the proceedings, and presenting such comments on the testimony, when the same shall be concluded (under the approbation of the court) as they might deem necessary." The court after mature consideration, decided that the application could not be granted. Ives, Military Law, 126, citing Trial by J. F. Cooper, 8, 9; DeHart, Military Law, 318.

§ 595. **Recalling Witnesses.**—After the case is finished and the court closed, it may, if it deem it necessary, recall any witness for the purpose of explaining discrepancies, or clearing up doubts in the minds of the members. In such cases the accused should always be present. The accused may himself be recalled for explaining points of his statement not clear. Ives, Military Law, 149.

§ 596. **Evidence of the Record on Appeal.**—Whenever the sentence of any court-martial shall be appealed from, which appeal shall always be made within twenty days after the decision appealed from is made known in published orders, such court, or the president thereof, shall forthwith furnish the officer, to whom such appeal is taken, with a statement of the case, and of the evidence touching the same.

This statement comprises simply a transcript of the record of the proceedings in the case of the appellant. King, Guide for Regimental Courts-martial, § 38 (1889).

If there is any evidence before a court-martial establishing the facts alleged, or if that court arrived at a conclusion that such facts existed upon a conflict of evidence even where the appellate court might upon the same evidence arrive at a different conclusion, the established practice would prevent a review of the decision.

But, on the other hand, if there is no legal evidence whatever that the matters contained in such specification are true, the court-martial did not have jurisdiction or power to render its judgment. *People v. Townsend*, 10 Abb. N. C. 169.

So, where it is shown that the court-martial has jurisdiction of the subject-matter and of the person of the accused, and evidence was introduced to support its finding, its conclusions, cannot be reviewed by a writ of certiorari. *People v. Townsend, supra*; *People v. New York County Jail Warden*, 100 N. Y. 20; *People v. Rand*, 41 Hun, 529.

§ 597. Partial Review of Miscellaneous Authorities.—

In *Re Bogart*, 2 Sawy. 397, the United States circuit court held that the military court has jurisdiction to try military offenses; that a former conviction, and the statute of limitations, were matters of defense, which must be investigated and determined in the exercise of jurisdiction, and not matters upon which the jurisdiction to hear and determine the charge depends; that these matters cannot be inquired into on habeas corpus; that the civil courts have no jurisdiction to review the action of the military courts, acting within their jurisdiction, and still less, to anticipate, and intercept the latter in the exercise of their lawful jurisdiction. This question was again examined and the decision affirmed, *Re White*, 9 Sawy. 49, 17 Fed. Rep. 723, *Mr. Justice Field*, and the circuit judge concurring. These decisions were approved, and followed by *Mr. Circuit Judge Wallace*, in *Re Davison*, 21 Fed. Rep. 618, reversing the district court on that point. The jurisdiction to try offenses committed in the naval or military service, unobstructed by the civil courts, was recognized in *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538, and *Re Bogart*, approvingly cited. That the civil courts cannot interfere with courts-martial in the exercise of their legitimate jurisdiction, was held by the Supreme Court in *Wales v. Whitney*, 114 U. S. 564, 570, 29 L. ed. 277, 278. And in *Smith v. Whitney*, 116 U. S. 177, 29 L. ed. 604, the Supreme Court says, "this court has repeatedly recognized the general rule, that the acts of a court-martial within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts by writ of prohibition, or otherwise," and again, with numerous other cases cites both in *Re Bogart* and *Re White, supra*, thereby recognizing those cases as properly laying down and applying the law.

A court of inquiry is, strictly speaking, not a court at all, but is a council, board or assembly of persons directed by a commanding officer to make inquiry and to collect evidence with respect to some doubtful or intricate subject into which he cannot conveniently inquire himself. It has no judicial power, and cannot give an opinion on the merits of the case inquired into, unless especially ordered to do so. The proceedings of a court of inquiry may be admitted as evidence by a court-martial in cases not capital, nor extending to the dismissal of an officer; provided, that the circumstances are such that oral testimony cannot be obtained. It is

propable however, that they would not be admitted in evidence in a civil court. Am. & Eng. Enc. Law, title *Military Law*.

Martial or military law, says Tytler, does not, in any respect, either supersede or interfere with the civil and municipal laws of the realm. Hence it appears that soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country and the fulfillment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country for all offenses against those laws and breach of those duties. Tytler, *Military Law*, 153.

A former acquittal or conviction of an act by a civil court, says Benet, is not a good plea in bar before a court-martial on charges and specifications covering the same. Benet, *Courts-martial*, 115.

Officers and soldiers of the army who do acts criminal both by the military and municipal law, are, under certain conditions and limitations, subject to be tried by the civil authorities in preference to the military; but the conviction or acquittal of the party by the civil authorities will not discharge the officer or soldier from responsibility for the military offense involved in the same facts. *Steiner's Case*, 6 Ops. Atty. Gen. 413.

No sentence of a court martial inflicting the punishment of death shall be carried into execution until it shall have been confirmed by the President, except in the enumerated cases of persons, including murderers convicted in time of war; but the same article provides that in such excepted cases the sentence of death may be carried into execution, upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.

The military forces of the state are organized in pursuance of the provisions of the Constitution of the United States and of the several states for the defense of the country and the maintenance of public order. The citizen soldier will remember that it is upon him, when the civil power has failed, that the state relies for the vindication of its laws and institutions, imperiled from whatever cause; and that in becoming the soldier, he has lost none of the characteristics or duties of the citizen, but has assumed, simply, such further obligations as imperatively demanded of him a conduct which shall inspire the confidence and respect of the people. See General Regulations for the Military Forces of the State of New York, p. 3.

The judgment of a military court, or a court-martial, if competent and constitutional, may likewise establish *res adjudicata*. But ordinarily an offense against a state is not barred by the action of a Federal court-martial, nor is a court-martial barred by a state prosecution for the same offense in its state aspects. Where, however, a court-martial has, by law, exclusive jurisdiction to try an offense, then its judgments is a bar to the proceedings of other tribunals. Whart. Crim. Ev. § 576, citing Whart. Crim. Pl. & Pr. § 439; *Dynes v. Hoover*, 61 U. S. 20 How. 65, 15 L. ed. 838; *Wooley v. United States*, 20 Law Rep. 631; *United States v. Reiter* (La.) 4 Am. L. Reg. N. S. 534; *State v. Rankin*, 4 Coldw. 145; *United States v. Cashiel*, 1 Hughes, 552; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118.

CHAPTER LXVI.

INTERSTATE RENDITION AND INTERNATIONAL EXTRADITION.

- § 598. *Term Extradition Defined.*
- 599. *New York Legislative Enactments Regarding.*
- 600. *Evidence under United States Revised Statutes.*
- 601. *Comments upon the Constitutional Provisions.*
- 602. *What Justifies the Issuance of the Warrant.*
- 603. *Rights of Parties Proceeded Against.*
- 604. *Conduct of Proceedings.*
- 605. *Evidence by Deposition.*
- 606. *Hearing on Application for.*
- 607. *Accused must be Tried for the Offense for which he was Extradited.*
 - a. *Distinction in Cases of Interstate Rendition.*
- 608. *Fugitive may be Surrendered for any Offense.*
- 609. *Evidence as Affected by Treaty Stipulations with Foreign States.*
- 610. *What Evidence will Authorize an Arrest.*
- 611. *What the Affidavits should Disclose.*
- 612. *Evidence in Habeas Corpus Proceedings.*

§ 598. **The Term Extradition Defined.**—It has been said that extradition is “the act of sending, by authority of law, a person accused of crime to a foreign jurisdiction where it was committed, in order that he may be tried there.” Merlin, *Jurisprudence*, *h. t.*

The government of the United States is bound by some treaty stipulations to surrender criminals who take refuge within the country, but independently of such conventions, it is questionable whether criminals can be surrendered. 1 Kent, Com. 36; *Re Washburn*, 4 Johns. Ch. 106; 1 Am. Jur. 297; *Com. v. Deacon*, 10 Serg. & R. 125; 22 Am. Jur. 330; Story, Conf. L. 520; Wheat. International Law, 111; 1 Bouvier, Law Dict. 350.

Public policy, the security of society, and the regular and perfect dispensation of justice, as well as the established maxims of statutory construction, alike require that the term “crime” should be held to comprehend every violation of law which is of an indictable nature.

§ 599. **New York Legislative Enactments Regarding.**—An attentive perusal of statutory law regulating this subject, will abundantly disclose the fact that the New York legislation on the subject is by far the most effective. The geographical position of the state with reference to the Canadian frontier, its dense population, the magnitude of its commercial enterprises and the facility with which criminals have heretofore evaded the law, are considerations that have inspired peculiarly stringent legislation on the subject. This legislation can of course effect nothing more than the relations which the state sustains to its sister commonwealths but its attitude upon the subject has given an impulse to congressional legislation that has left its impress upon our treaty relations with Great Britain, and has directly controlled the recitals in the present extradition treaty with Canada. Section 827 *et seq.* of the New York Code of Criminal Procedure provides as follows:

“It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant or temporary resident of this state is to be arrested as a fugitive from justice (provided that said requisition be accompanied by a duly certified copy of the indictment or information from the authorities of such other state or territory, charging such person with treason, felony or crime in such state or territory) to issue and transmit a warrant for such purpose to the sheriff of the proper county or his under sheriff, or in the cities of this state (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction shall be competent to make service of or execute the same. The governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and entrusted the execution of the governor’s warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this state, or of any city, county, town or village thereof, must, upon request of the governor, fur-

nish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

“Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the supreme court, of any superior city court, or the presiding judge of a court of sessions, who shall, in open court if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the governor thereon, he or they may have a writ of habeas corpus upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said court or judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the governor, and one of the judges aforesaid or a counselor at law of this state, and such waiver shall be immediately forwarded to the governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against, and mentioned in the requisition, the accompanying papers and the warrant issued by the governor thereon, then the court or judge shall order and direct the officer intrusted with the execution of the said warrant of the governor to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as the agent or agents upon the part of such state to receive him or them; otherwise to be discharged from custody by the court or judge.

“If upon such hearing the warrant of the governor shall appear to be defective or improperly executed, it shall be by the court or judge returned to the governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the court or judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

"It shall not be lawful for any person, agent or officer to take any person or persons out of this state, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings above described, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this state, for the purpose of taking him or sending him to another state, without a requisition first duly had and obtained, and without a warrant duly issued by the governor of this state, served by some officer as in this section provided, and without, except in case of waiver in writing as aforesaid, taking him before a court or judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats of undue influence, persuade any citizen, inhabitant or temporary resident of this state to sign the waiver of his right to go before a court or judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction be sentenced to imprisonment in a state prison or penitentiary for the term of one year.

"Any willful violation of this act by any of the above named officers shall be deemed a misdemeanor in office.

"§ 828. Magistrate to issue warrant.—A magistrate may issue a warrant as a preliminary proceeding to the issuing of a requisition by the governor of another state or territory upon the governor of this state for the apprehension of a person charged with treason, felony or other crime, who shall flee from justice and be found within this state.

"§ 829. Proceedings for arrest and commitment of the person charged.—The proceedings for the arrest and commitment of the person charged are in all respects similar to those provided in this code, for the arrest and commitment of a person charged with a public offense committed in this state; except, that an exemplified copy of an indictment found, or other judicial proceedings had against him, in the state or territory in which he is charged to have committed the offense, may be received as evidence before the magistrate.

"§ 830. When and for what time to be committed.—If, from the examination under such warrant, it appears probable that the person charged has committed the crime alleged, the magistrate,

by warrant reciting^g the accusation, must commit him to the proper custody in his county, for a time specified in the warrant, to enable an arrest of the fugitive to be made under the warrant of the governor of this state, which commitment shall not exceed thirty days, exclusive of the day of arrest, on the requisition of the executive authority of the state or territory in which he is charged to have committed the offense, unless he give bail, as provided in the next section, or until he be legally discharged.

“§ 831. His admission to bail.—Any judge of any court named in section eight hundred and twenty-seven may, in his discretion, admit the person arrested to bail, by an undertaking, with sufficient sureties and in such sum as he deems proper, for his appearance before him at a time specified in the undertaking, which must not be later than the expiration of thirty days from the date of arrest, exclusive of such date, and for his surrender, to be arrested upon the warrant of the governor of this state.

“§ 832. Magistrate to give notice to district attorney, of name of the person and the cause of his arrest.—Immediately upon the arrest of the person charged, the magistrate must give notice to the district attorney of the county of the name of the person and the cause of his arrest.

“§ 833. District attorney to give notice to executive authority of the state or territory, etc.—The district attorney must immediately thereafter give notice to the executive authority of the state or territory, or to the prosecuting attorney or presiding judge of the criminal court of the city or county therein, having jurisdiction of the offense, to the end that a demand may be made for the arrest and surrender of the person charged.

“§ 834. Persons arrested to be discharged, unless surrendered within the time limited.—The person arrested must be discharged from custody or bail, unless before the expiration of the time designated in the warrant or undertaking, he be arrested under the warrant of the governor of this state.”

§ 600. Evidence under United States Revised Statutes.—Title LXVI. of the Revised Statutes of the United States, concerning extradition reads as follows :

“Sec. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit

judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." *Benson v. McMahon*, 127 U. S. 457, 32 L. ed. 234.

In extradition cases the whole subject of foreign intercourse is committed to the Federal Government. *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483; *Ex parte Windsor*, 10 Cox, C. C. 121; *Re Eno*, Spear, Extradition, 276; Clark, Extradition, 131, 134; 7 Legal News, 360, 361; 10 Quebec Law Rep. 194; *Re Tully*, 20 Fed. Rep. 816.

"In every case of complaint and of a hearing upon the return of a warrant of arrest, any depositions, warrants or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section." U. S. Rev. Stat. § 5271.

Section 3 of the Act of August 3, 1882 (22 Stat. at L. 215) provides: "That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public. . . . That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material for his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such case the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States."

"If, on such examination, it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commissioner finds, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any state thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested, shall be paid by the consular officers making the application." U. S. Rev. Stat. § 4081.

Section 5 of the Act of Congress of August 3, 1882 (22 Stat. at

L. 215), provides: "That in all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence, upon the hearing of any extradition case under title 66 of the Revised Statutes of the United States, such depositions, warrants and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped; and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant or other paper, or copies thereof, so offered, are authenticated in the manner required by this Act." The certificate provided for by the Act is conclusive evidence on the question of authentication; but it is not the only evidence that may be offered upon that point. Authentication in regard to original papers may be made by oral proof. *Re Fowler*, 18 Blatchf. 437, 4 Fed. Rep. 303; *Re McPhun*, 30 Fed. Rep. 57; *Re Wadge*, 15 Fed. Rep. 865, 16 Fed. Rep. 333, 21 Blatchf. 300.

By the Act of 1793, three things are rendered necessary to precede and justify the warrant of extradition. There must be a demand from the governor of the state within which the crime has been committed for the surrender of the fugitive who has fled from his jurisdiction. Such requisition must be accompanied by an indictment, or an affidavit charging the commission of the offense. And such indictment or affidavit must be authenticated by the certificate of the executive making the requisition. These preliminary conditions are essential. To say they are not would be to disregard the law, and make the executive an autocrat. If they are essential, their presence or absence in a given case must, of necessity, become the subject of judicial investigation when the judgment of the law is invoked. The New York Court of Appeals have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before the court, it is both right and proper to examine them, and judge and determine, when legal process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition. *People v. Brady*, 56 N. Y. 182.

"The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import;

and if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptance. The current of authority at the present day, is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself." 1 Kent, Com. 1, pt. 111, p. 462.

§ 601. **Comments upon the Constitutional Provisions.**—The language of the constitution is, as regards the nature of the duty to deliver the fugitives, imperative and unequivocal: "A person . . . charged with treason, felony, or other crime, who shall flee from justice and be found in another state, shall on demand," etc., be delivered up. And the great weight of authority, as well as the obvious import of the language used, is that the constitution established an absolute right to the surrender, when the case was one coming within the terms of the constitution,—that is, the case of a person charged with crime, who had fled from justice, and whose surrender was demanded by the proper authority. It is true, that the duty has been by the governors of some of the states, treated as discretionary, but the authorities are clearly against this view. *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 68, 16 L. ed. 717. It has been well remarked, in reference to the case last cited, that although the court finally came to the conclusion that they had no jurisdiction to grant the mandamus prayed for, yet the views expressed in that decision as to the construction of this clause of the constitution possess but little less than the force of absolute authority. *Re Voorhees*, 32 N. J. L. 149.

§ 602. **What Justifies the Issuance of the Warrant.**—To justify the issuance of a warrant of rendition of a fugitive from justice, it must appear, First, that a demand of him as a fugitive from justice has been made by the executive authority of the state where the crime charged was committed. Second, such demand must be accompanied by the copy of an indictment found, or an affidavit made before a magistrate of said state, charging

the person so demanded with having committed treason, felony or other crime; and, Third, such copy must be certified as authentic by such executive authority. U. S. Const. art. 4, § 2; U. S. Rev. Stat. § 5278; *People v. Pinkerton*, 17 Hun, 199.

“Upon the question whether the warrant of the governor is conclusive evidence in this proceeding that the party named in the warrant stands charged with crime in the state demanding his surrender, I am of opinion both on reason and authority that the warrant is conclusive. The statute itself expressly provides that the governor shall cause the party to be arrested and delivered up. It makes no provision for any other proceedings whatever subsequent to the issue of the mandate of the governor except the delivery of the party and his removal by the agent of the demanding state.

“Not only is there nothing in the act to show that any proceedings subsequent to the issue of the warrant were contemplated to give full authority for the arrest and removal of the party, but there is nothing in the act requiring the governor issuing the warrant to attach thereto the evidence or copies of the evidence on which he acted, nor since the passage of the act has the practice obtained, so far as appears, of attaching such copies.” Choate, *J.*, in *Leary's Case*, 6 Abb. N. C. 43.

Jurisdiction cannot be acquired by the forcible bringing of a party into the state. Neither can it be obtained by acts which could constitute a crime in both countries. The prisoner could not be said to have “fled” into this state if he had been forcibly brought here.

So long as the prisoner comes voluntarily into the state, it would seem that the people are not bound to inquire further as to the means or inducements which some witness or third person may have used to induce his coming, before they are permitted to arrest him. The case is to be considered the same as though the prisoner had fled from this state into Canada and had then returned here. It makes no difference that he fled from a sister state rather than from this state. It is sufficient that he is a “fugitive from justice” and is found in our own state. *Re Brown*, 4 N. Y. Crim. Rep. 576.

The courts of a state will not generally investigate, either on habeas corpus proceedings or on final trial, the mode of the prisoner's capture, whether it was legal or illegal, whether it was

under lawful process or without any process at all, where he has fled to another state or country and been brought again into its jurisdiction. The question is the legality of the prisoner's detention, not the legality of his arrest, unless on the complaint of the governor of the state whose laws were violated by such unlawful arrest.

This is the accepted doctrine of the state and Federal courts, and is founded on an ancient and well settled principle of the common law. *Spear*, Extradition, 181, 492, 554; 7 Am. & Eng. Enc. Law, 643, 653, *note*; *Re Fetter*, 23 N. J. L. 311, 57 Am. Dec. 400, *note*, and cases cited; *Com. v. Shaw* (Pa.) 6 Crim. L. Mag. 245; *Ex parte Barker* (Ala.) 11 Crim. L. Mag. 632.

In *State v. Brewster*, 7 Vt. 118, where the prisoner had been kidnapped in Canada and forcibly brought into the state of Vermont, his discharge was refused, and he was held liable to answer an indictment for crime in the latter state. A like ruling was made in *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, in the case of one who had been seized by private persons in Peru, without warrant of law, and was brought to California, and from thence to the state of Illinois by process of extradition. The authorities on the subject are ably reviewed in this case by Scott, *J.*, and the United States Supreme Court, on appeal to that tribunal, declined to disturb the judgment of the supreme court of Illinois. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421. See also *Spear*, Extradition, 181-186; *Ex parte Ker*, 18 Fed. Rep. 167.

§ 603. **Rights of Party Proceeded Against.**—On the examination of a party before a United States commissioner in the state of Minnesota, in extradition proceedings under the Treaty of 1842 with Great Britain, he has the right to examine witnesses in his own behalf. *Re Kelley*, 25 Fed. Rep. 268. The testimony of the accused is not admissible, although the judge be sitting in a state where such evidence is admissible. *Re Dugan*, 2 Low. Dec. 367. The Treaty of Extradition with Great Britain does not give the accused the right to be confronted by witnesses against him; the evidence may be in the form authorized in the country whence it comes, and in substance sufficient to warrant action in the country whose action is invoked. *Re Dugan, supra*. Extradition proceedings do not involve in their nature the right of accused not to be prosecuted upon any other charge than that upon which his extradition is asked. *United States v. Law-*

rence, 13 Blatchf. 295, 6 Ops. Atty. Gen. 691; *United States v. Caldwell*, 8 Blatchf. 131; *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317; *Re Miller*, 23 Fed. Rep. 33. But one extradited from a foreign country may claim exemption from trial upon any charge other than that mentioned in the extradition proceedings; and this right cannot be waived. *Ex parte Coy*, 32 Fed. Rep. 911. It may be open to the petitioner, when before the Canadian courts, to show that the extradition proceedings were not prosecuted in good faith. But, having been surrendered, it is not for him to raise that question before the tribunals of his own country. *Adriance v. Lagrave*, *supra*; *Dow's Case*, 18 Pa. 37; *Re Miller*, *supra*.

Where a person has been brought within the jurisdiction of a court upon a requisition as a fugitive from justice, and has been tried for, or discharged as to, the offense charged against him, he ought not to be subject to arrest on a civil process until a reasonable time and opportunity has been given him to return to the state from which he was taken. In the courts of the United States the weight of judicial opinion is in favor of the proposition that where a party in good faith is brought within the jurisdiction of a state, or detained therein, being a nonresident, either as a party to a suit or as a witness in another suit, he is not subject to service. *Small v. Montgomery*, 23 Fed. Rep. 707; *Juneau Bank v. McSpedan*, 5 Biss. 64; *United States v. Bridgman*, 9 Biss. 221; *Blair v. Turtle*, 1 McCrary, 372; *Atchison v. Morris*, 11 Fed. Rep. 582. Many of the state courts hold the same rule. *Compton v. Wilder*, 40 Ohio St. 130; *People v. Detroit Sup. Ct. Judge*, 40 Mich. 730; *Re Cannon*, 47 Mich. 482; *Baldwin v. Branch Circuit Judge*, 48 Mich. 525; *Jacobson v. Hosmer*, 76 Mich. 234; *Sherman v. Gundlach*, 37 Minn. 118; *Chubbuck v. Cleveland*, 37 Minn. 466; *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844; *Wanzer v. Bright*, 52 Ill. 35; *Williams v. Reed*, 29 N. J. L. 385; *Hill v. Goodrich*, 32 Conn. 588. The last three cases go upon the same ground as *Townsend v. Smith*, 47 Wis. 623, 32 Am. Rep. 793.

§ 604. **Conduct of Proceedings.**—The rules prescribed for the conduct of proceedings under extradition treaties are: (1) demand for surrender and mandate of the president; (2) previous designation of the commissioner before whom the warrant of arrest is returnable; (3) certificates to documentary evidence; (4)

record by the commissioner of the proceedings before him; (5) verified translations of documents in foreign languages; (6) contents of complaint. *Re Henrich*, 5 Blatchf. 414. Whether a party making complaint is duly authorized to appear in behalf of the foreign government is a matter to be inquired into before the commissioner. *Re Kelly*, 26 Fed. Rep. 852. On motion of a sovereignty making the demand, a commissioner may in his discretion adjourn the hearing of the extradition proceedings. *Re Ludwig*, 32 Fed. Rep. 774; *State v. Jackson* (Tenn.) 1 L. R. A. 373, note.

§ 605. **Evidence by Deposition.**—Copies of depositions taken by a magistrate in a foreign country must be certified by the United States Consul there to be authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country. *Re McPhun*, 24 Blatchf. 254, 30 Fed. Rep. 57. Upon hearing a case arising under treaty, not only copies of depositions, but also copies of warrants and other papers, certified under the hand of the person issuing the same, and attested on oath of the party producing them to be true copies, are admissible as evidence of criminality of the accused. *Ex parte Ross*, 2 Bond, 252. The Act of Congress of 1860, relating to proof of authenticity of papers produced in the proceedings, does not repeal prior acts, but merely provides another mode of authentication. *Ex parte Ross, supra*. The judicial proceeding in a Prussian court being valid evidence in that country, a certificate of the United States Minister, that the documents are legally authenticated, entitles them to be received here as evidence where the certificates are in sufficient form. *Re Behrendt*, 23 Blatchf. 40; *Re Farez*, 7 Blatchf. 345; *Re Wadge*, 15 Fed. Rep. 864, 21 Blatchf. 300. Under the Act of 1882, regarding evidence in extradition cases, the certificate of the resident minister to copies of documentary evidence from abroad may be supplemented by oral proof of competency of the originals. *Re Wadge, supra*; *Re Henrich*, 5 Blatchf. 414. Under the Revised Statutes, depositions may be authenticated by a Vice Consul of the United States. *Re Herres*, 32 Fed. Rep. 165.

The Act of Congress declares in substance "that in extradition cases copies of depositions relating to the allegations in the complaint shall be received and admitted as evidence on the hearing, for all the purposes of the hearing, if they shall be properly and

legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consulate officer shall be proof that any deposition, warrant, or other paper, or copies thereof so offered, are authenticated in the manner required by this Act." See 22 Stat. at L. p. 216, § 5.

The certificate of the consul to the depositions fully meets the requirements of this Act to entitle depositions to be received by the commissioner as evidence of criminality. It has been held by all tribunals which have passed upon this Act of 1882 that "similar purposes" refer to the words "for all the purposes of such hearing," that is, to proof of criminality. See *Re McPhun*, 30 Fed. Rep. 57; *Re Herries*, 32 Fed. Rep. 583; *Re Henrich*, 5 Blatchf. 414.

§ 606. **Hearing on Application for.**—Where there is an application for extradition, sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application; he has only to examine the evidence of criminality, and if not sufficient to sustain the charge, to certify the same to the secretary of state. *Re Dugau*, 2 Low. Dec. 367. The first question is one of law, open upon the face of the papers to judicial inquiry; the second is one of fact, upon which the governor's decision is sufficient to justify removal until the presumption in its favor is overthrown. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544. In a proceeding under the Treaty with Great Britain evidence of criminality must be such as would justify the arrest and commitment of the accused according to law in the place where he is found. *Re McPhun*, 24 Blatchf. 254, 30 Fed. Rep. 57; *Ex parte Kaine*, 3 Blatchf. 1; *United States v. Warr*, 3 N. Y. Legal Obs. 346; *Re Heilbronn*, 12 N. Y. Legal Obs. 65; 4 Ops. Atty. Gen. 201, 330; *Re Kelley*, 2 Low. Dec. 339; *Re Macdonnell*, 11 Blatchf. 170; *Re Farez*, 2 Abb. U. S. 346.

In *People v. Pinkerton*, 17 Hun, 199, it was held, that "Where a warrant is issued by the governor for the rendition of a fugitive from justice, the court cannot go behind the warrant and inquire into the truth of the facts recited in it. The governor in determining that the Act of Congress has been complied with, has no jurisdiction to inquire into the truth of the charges made,

or to look outside of the papers presented to determine whether or not the person demanded is a fugitive from justice. The fact that the person has committed a crime in another state and that he has been found in this state, established conclusively that he is a fugitive from justice." It was also said in that case that where "the rendition warrant is accompanied by the papers on which it issued, the question as to the sufficiency of those papers, as a compliance with the Act of Congress, is before the court." That case was approved by the court of appeals in *People v. Pinkerton*, 77 N. Y. 245, and it was held that the "recitals in the warrant of a governor of this state for the arrest of a fugitive from the justice of another state are to be taken, at least *prima facie*, as true." In *People v. Donohue*, 84 N. Y. 438, it was held, viz: "Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires." In the opinion delivered in that case it was said: "Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the executive in the exercise of official discretion and authority, we can look only to the warrant itself, and its recitals, for the evidence that the essential conditions of its issue have been fulfilled."

§ 607. **Accused must be Tried for the Offense for which he was Extradited.**—Evidence is always relevant which tends to show that the accused is on trial for an offense other than the one specified in the papers upon which he was extradited. The elaborate and exhaustive opinion of Valentine, *Justice*, in the recent case of *State v. Hall*, 40 Kan. 338, commends itself to our judgment, as a correct exposition of the law; and it would be difficult to add anything to the force of his reasoning. Can a person be extradited for one offense and immediately tried for a wholly different offense? We would think not. It is a general maxim of law that judicial process shall not be abused. But to try a person for an offense other than the one for which he was extradited would be an abuse of judicial process. Within this broad and general maxim is included the following more definite rule of law, to wit: Where the presence of a person has been changed from a place outside of the territorial jurisdiction of a court of justice to a place within such jurisdiction, and this change

has been procured through the instrumentality of another person and upon a pretext of thereby accomplishing some particular purpose, such first mentioned person cannot, after his presence has been thus obtained within the territorial jurisdiction of the court, and before he has had an opportunity to return, be prosecuted in such court by the person who has thus been instrumental in procuring his presence, for the purpose of accomplishing some wholly different purpose. This rule of law has often been applied by the courts in civil cases: *Van Horn v. Great Western Mfg. Co.* 37 Kan. 523, 526, and cases there cited; *Spear*, Extradition, 526, and cases there cited; *Compton v. Wilder*, 40 Ohio St. 130. A fugitive from justice can be obtained from another state or country only with the consent of the executive authorities of such other state or country; and for a state to procure a fugitive from justice from some other state or country to be tried for some particular offense, by the consent of such other state or country, and then to try him for another and a different offense before he has had an opportunity to return, would be such an unwarranted abuse of judicial process, such a fraud upon justice, such an act of perfidy, that no court in any country should for a moment tolerate the same.

The foregoing rule applies in criminal cases where the fugitive from justice has been extradited from a foreign country. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425; *United States v. Watts*, 8 Sawy. 370; *Ex parte Hibbs*, 26 Fed. Rep. 421; *Ex parte Coy*, 32 Fed. Rep. 911, and *note*; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

a. Distinction in Cases of Interstate Rendition.—It is our endeavor in this subdivision to specifically note a distinction of great importance pertaining to this subject. For eighty years the claim has been steadily advanced in behalf of fugitive criminals and maintained with great ingenuity and vigor, that under no circumstances can he be tried for any other offense than that specifically stated in the demanding papers served upon the executive of the asylum state. This theory expands its many plausibilities upon the cardinal principles that underlie treaty stipulations with foreign states, and the extreme speciousness that supports the argument sustaining it have led many courts of high repute into erroneous rulings regarding it. The fallacy of the entire assumption lies in a misapprehension of the nature and

scope of interstate rendition on the one hand and international extradition on the other. The first is amenable to and circumscribed by the recitals of the Federal Constitution. The second is entirely *dehors* that instrument and is dependent for interpretation upon treaty obligations solely.

Interstate rendition will permit the accused to be tried, in the demanding state for any crime whatever against its laws irrespective of the offense alleged in the moving papers, on the contrary every principle of international law and comity demands in extradition proceedings that the trial shall be had only for the identical offense charged. This distinction is admirably stated by *Mr. Justice Jackson* in *Lascelles v. Georgia* (U. S. Sup. Ct.) April 3, 1893—a case that will effectively quell all future controversy on the subject. What follows under this subdivision is an extract from that able opinion :

“The proposition advanced on behalf of the plaintiff in error in support of the Federal right claimed to have been denied him is, that inasmuch as interstate rendition can only be affected when the person demanded as a fugitive from justice is duly charged with some particular offense, or offenses, his surrender upon such demand carries with it the implied condition that he is to be tried alone for the designated crime, and that in respect to all offenses other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the states of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do, in fact, afford to all persons within their boundaries an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in *United States v. Rauscher*, 119 U.S. 407, 30 L. ed. 425 *et seq.*, is invoked as a controlling authority on the question under consideration. If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the states of the Union

occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the state to which he may flee some state or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another state, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement, in another form, of the question presented for our determination. The sole object of the provision of the Constitution and the Act of Congress to carry it into effect is to secure the surrender of persons accused of crime, who have fled from the justice of a state, whose laws they are charged with violating. Neither the Constitution, nor the Act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done. *Kentucky v. Dennison*, 65 U. S. 24 How. 66, 101, 102, 16 L. ed. 717, 727; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250.

"The case of *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, has no application to the question under consideration, because it proceeds upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation."

A fugitive from justice surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was rendered up, but may, after being resorted to the demanding state, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after extradition. *Re Noys*, 17 Alb. L. J. 407; *Ham v. State*, 4 Tex. App. 645; *State v. Stewart*,

60 Wis. 587, 50 Am. Rep. 388; *People v. Cross*, 135 N. Y. 536; *Re Miles*, 52 Vt. 609.

It is settled that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process. *Ker v. Illinois*, 119 U. S. 436, 444, 30 L. ed. 421, 424; *Mahon v. Justice*, 127 U. S. 700, 707, 708, 712, 32 L. ed. 283, 285-287; *Cook v. Hart*, 146 U. S. 183, 190, 192, 36 L. ed. 934, 938, 939.

§ 608. **Fugitive may be Surrendered for any Offense.—**

The statute requiring the surrender of a fugitive from justice found in one of the territories, to the state in which he stands charged with treason, felony, or other crime, embraces every offense known to the laws of the demanding state, including misdemeanors. Each state has the right to prescribe the forms of pleading and process to be observed in her courts, in both civil and criminal cases, subject only to those provisions of the national Constitution designed for the protection of life, liberty and property in all the states of the Union; consequently, in a case involving the surrender, under the Act of Congress, of a fugitive from justice; it may not be objected that the indictment is not framed according to the technical rules of criminal pleading, if it conforms substantially to the laws of the demanding state. Upon the executive of the state or territory in which the accused was found rests the responsibility of determining whether he is a fugitive from the justice of the demanding state. But the Act of Congress does not direct or authorize his surrender, unless it is made to appear that he is, in fact, a fugitive from justice. If the determining of that fact, upon proof before the executive of the state where the alleged fugitive is found, is subject to the judicial review upon habeas corpus, the accused, being in custody under his warrant which recites the requisition of the demanding state, accompanied by an authentic indictment, charging him substantially as required by her laws with a specific crime committed within her jurisdiction—should not be discharged because, in the judgment of the court, the proof showing that he was a fugitive from justice may not be as full as might properly have been required. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250.

§ 609. **Evidence as Affected by Treaty Stipulations with Foreign States.**—"Most of the treaties [with foreign states] prescribe the evidence required to authorize an order of extradition. All hearings under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public. Act Aug. 3, 1882, § 1, 22 Stat. at L. 215. . . . On the hearing of any case, upon affidavit being filed by the person charged, that he cannot safely go to trial without certain witnesses, what he expects to prove by each of them, that he is not possessed of sufficient means and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom the hearing is had may order that they be subpœnaed; the costs to be paid as similar fees are paid in the case of witnesses subpœnaed in behalf of the United States. Act Aug. 3, 1882, § 3, 22 Stat. at L. 215. . . . Fees and costs shall be certified to the Secretary of State of the United States, who shall authorize payment of the same out of the appropriation to defray the expenses of the judiciary, and shall cause the amount to be reimbursed by the foreign government by whom the proceeding may have been instituted. Act Aug. 3, 1882, § 4, 22 Stat. at L. 215. . . . Where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any case, the same shall be received as evidence for all the purposes of such hearing if they shall be legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this Act. Act Aug. 3, 1882, § 5, 22 Stat. at L. 215." Anderson, Law Dict. title *Extradition*, p. 439.

With reference to these extradition proceedings, the substance, and not the form, should be the main object of inquiry, and they should not be conducted in any technical spirit with a view to prevent extradition. *Re Herres*, 33 Fed. Rep. 165.

Some cases declare the familiar principle of international law, that the right of one government to demand and receive from another the custody of an offender against its laws, and who has sought an asylum in such foreign country, depends upon treaty

stipulations between such governments. Where no treaty exists, no obligation that can be insisted upon exists to surrender criminals for trial to the government from which they have fled; but as a matter of comity between nations, great offenders are usually surrendered on request from the government claiming the right to try them. A principle running through this latter class of cases has much that commends itself to a sense of justice. It is, that where a person whose extradition has been granted for trial for a particular crime named in the extradition warrant, the demanding government obtains no lawful right to try him for any other offenses, without bad faith to the government that consented to his extradition, and for which it would have just grounds to demand reparation. Such an act would be in violation of both the letter and spirit of the treaty. *Ker v. People*, 110 Ill. 627.

In cases of extradition by a foreign government under a treaty, the Supreme Court of the United States holds that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty could only be tried for one of the offenses with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity has been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425.

A distinction is made in some of the authorities between civil and criminal cases. In criminal cases, some courts hold that even a forcible seizure in another country, and the transfer by violence or fraud to this country, is no sufficient reason why the party should not answer when brought within the jurisdiction of a court which has the right to try him for such an offense. See *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283.

In proceedings for the extradition of a fugitive, evidence to contradict all that of the prosecution is not admissible. The accused is only entitled to show that the offense charged is not a crime mentioned in the treaty. *Re Debaun* (Canada) 11 Crim. L. Mag. 47.

§ 610. **What Evidence will Authorize an Arrest.**—The evidence to detain the accused, for the purpose of surrender, must be sufficient to commit the party for trial, if the offense was committed in this country.

In the case of *Ex parte Kaine*, 3 Blatchf. 1, in 1853, *Mr. Justice Nelson* said:

"The proof, in all cases under a treaty of extradition, should be not only competent, but full and satisfactory, that the offense has been committed by the fugitive in the foreign jurisdiction—sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof."

The rule here announced does not appear to have been adopted, and is regarded with considerable suspicion.

The evidence to justify the holding of a prisoner for trial is such as amounts to "probable cause" to believe him guilty. It is not necessary that it should be sufficiently conclusive to authorize his conviction. In *Re Farez*, 7 Blatchf. 345, *Judge Blatchford* said that he adopted the language of *Chief Justice Marshall*, sitting as a committing magistrate in *Burr's Case*, who said:

"On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be, a case made out by proof, furnishing good reason to believe that the crime alleged to have been committed by the person charged with having committed it." 1 *Burr's Trial*, 11.

Another definition of probable cause which has often been quoted is that of *Mr. Justice Washington*, in *Munns v. Dupont*, 3 Wash. C. C. 31, which is as follows: "What then, is the meaning of the term 'probable cause?' We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged." This is a very different thing from requiring evidence sufficient for conviction, which must be such as to leave no reasonable ground of guilt. *Moore, Extradition & Rendition*, § 340.

The question of guilt or innocence is wholly irrelevant in determining the action of the executive of the state upon which the demand is made. That question is to be investigated and determined by the courts of the state where the alleged crime was

committed. But there must be a charge of crime existing against the fugitive in the state demanding his surrender, before the demand can legally be made, and it was said by Taney, *Ch. J.*, in *Kentucky v. Dennison*, 65 U. S. 24 How. 104, 16 L. ed. 728, that it must be a charge made in the regular course of judicial proceedings. *People v. Brady*, 56 N. Y. 182.

The sufficiency of the rules of evidence necessary to justify the retention of the alleged criminal, must be such as would warrant his apprehension under a similar charge in the asylum state; and these rules of evidence may be such as Congress has prescribed, or in the absence of such provisions, and in so far as they may be inapplicable under the common law.

"Each piece of the documentary evidence offered by the agents of the foreign government in support of the charge of criminality should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country." *Re Henrich*, 5 Blatchf. 414.

§ 611. What the Affidavit should Disclose.—The affidavit must directly charge that petitioner has committed an offense, as it would be a dangerous precedent to establish, that any man may be deprived of his liberty and removed to another state upon such an accusation. The statement therein, that affiant "has reason to believe, and does believe," that petitioner embezzled, or fraudulently converted to his own use, the property mentioned, is not the statement of any fact, and for that reason the affidavit is fatally defective. The language of the supreme court of Michigan in *Swart v. Kimball*, 43 Mich. 451, is applicable here:

"Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law; the most improbable stories may be believed by any one, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt.

"A mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending

to show guilt, is insufficient to support a warrant. The liberty of a citizen cannot be violated upon the mere expression of an opinion under oath, that he is guilty of a crime." *Ex parte Dimmig*, 74 Cal. 165.

In *Ex parte Smith*, 3 McLean, 121, the affidavit accompanying the requisition of the governor of Missouri for the arrest of Smith was made by one Boggs, and charged "that on the night of the sixth day of May, 1842, while sitting in his dwelling, in the town of Independence in the county of Jackson, he was shot, with intent to kill, and that his life was despaired of for several days, and that he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, common called the Mormon Prophet, was accessory before the fact of the intended murder, and that the said Joseph Smith is a citizen and resident of the state of Illinois."

This affidavit was held insufficient as a basis for the governor's warrant, upon the ground, among others stated, that it was not positive in its charge.

§ 612. **Evidence in Habeas Corpus Proceedings.**—In a habeas corpus proceeding for the discharge of an alleged fugitive it may be shown by parol evidence that the accused committed the crime in the demanding state as alleged in the warrant of extradition and that he is in fact a fugitive from the justice of said state. *Wilcox v. Nolze*, 34 Ohio St. 520. See Am. & Eng. Enc. Law, title *Extradition*, 27.

The Federal and state courts have concurrent jurisdiction in extradition proceedings. *Ex parte Brown*, 28 Fed. Rep. 653; *Re Roberts*, 24 Fed. Rep. 132. A person arrested under a warrant of extradition from one state of the Union to another "is in custody under or by color of the authority of the United States;" and the national courts have jurisdiction to inquire by habeas corpus into and determine the legality of the same. *Re Doo Woon*, 18 Fed. Rep. 898. The question of lawful arrest of a person as fugitive from justice from another state may be inquired into upon a writ of habeas corpus issued by either a Federal or state court. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544. Although the courts have power, on habeas corpus, to review the decisions of the executive authority in extradition proceedings, they will not overrule such decisions unless they are clearly satis-

fied that an error has been committed. *Ex parte Brown, supra*. In a case arising on habeas corpus, the court cannot investigate the question as to the guilt or innocence of the defendant (*Re Roberts, supra*) or the grade of the guilt. *Re Palmer*, 18 Int. Rev. Rec. 84. Where there is sufficient competent evidence before the commissioner for him to exercise his judgment as to its sufficiency, his decision will not be reviewed on habeas corpus. *Re Wadge*, 21 Blatchf. 300. The circuit court has power on a writ of habeas corpus, in conjunction with a writ of certiorari, to revise the action of the commissioner committing accused for surrender under an extradition treaty. *Re Henrich*, 5 Blatchf. 414. If the commissioner should commit the prisoner upon no clearer or more convincing testimony than was presented at the former examination, the circuit court has power to review the testimony and correct his error. *Re Kelly*, 26 Fed. Rep. 852. The court will not reverse the decision of the commissioner on the question of criminality of the accused. *Re Stupp*, 12 Blatchf. 501; *Re Macdonnell*, 11 Blatchf. 170; *Re Vandervelpen*, 14 Blatchf. 137; *Re Wahl*, 15 Blatchf. 334; *Re Wiegand*, 14 Blatchf. 370. No appeal lies from the judgment of the United States circuit court on a habeas corpus in an extradition case. *Re Henrich, supra*. A fugitive from justice, charged with crime, will not be released on habeas corpus, because he was induced by a stratagem to come within territory where he could be properly arrested, provided the stratagem used was not itself an infraction of law. *Ex parte Brown, supra*. But where a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, he may be discharged on a writ of habeas corpus. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274.

Mr. Church, in his work on Habeas Corpus, says: "A warrant for the arrest and return of a fugitive criminal must recite or set forth the evidence necessary to authorize the state executive to issue it; and unless it does it is illegal and void." He cites in support of his text *Re Doo Woon*, 18 Fed. Rep. 898. That case fully supports the text, and cites as authority *Ex parte Smith*, 3 McLean, 121, and *Ex parte Thornton*, 9 Tex. 635; *Ex parte Stanley*, 25 Tex. App. 372.

"The certainty of the commitment ought to appear; and a commitment is liable to the same objection where the case is so loosely

stated that the court cannot adjudge whether there was a reasonable ground of commitment or not. A commitment does not sufficiently state the offense by simply designating it by the species or class of crimes to which the committing magistrate may consider it to belong, but it ought to state the facts charged or found to constitute the offense, with sufficient particularity to enable the court, on a return to the habeas corpus, to determine what particular crime is charged against the prisoner." McCunn, *J.*, in *Re Leland*, 7 Abb. Pr. N. S. 64. See also *Re Rutter*, 7 Abb. Pr. N. S. 67.

NOTE.—What follows is a draft of the regulations for many years in vogue in the state of New York, relating to the topic under review. They have been cordially endorsed by ex-Governor Rice, of Massachusetts, who pronounces them in every way admirable, meeting all of the legal requirements, both as regards the rights of the accused, and the duties of the executive. They are reputed to have been drafted by the late Hon. John K. Porter, and are thought to be worthy of insertion as affording several valuable suggestions as to the rules of evidence governing these cases.

RULES FOR APPLICATIONS FOR EXTRADITION.

STATE OF NEW YORK, EXECUTIVE CHAMBER, Aug. 1, 1855.

The following rules will be observed by the Governor of the State of New York in reference to applications for requisitions on Governors of other States and Territories, and the Chief Justice of the Supreme Court of the District of Columbia. U. S. Rev. Stat. § 5278; Rev. Stat. relating to the District of Columbia, § 843.

The application must be made by the district attorney of the county in which the offense was committed, and must be in duplicate original papers, except indictments, which must be certified copies.

The following must appear by the certificate of the district attorney:

A. The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be accurately spelled, Roman capital letters, for example, JOHN DOE.

B. That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial, at the public expense, and that he is willing that such expense be a charge on the county in which the crime was committed.

C. That he believes he has sufficient evidence to secure a conviction of the fugitive.

D. That the person named as agent is the proper person, a public officer (naming his official position), and that he has no interest in the arrest of the fugitive.

E. If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

F. If the fugitive is known to be under either civil or criminal arrest, the fact of such arrest and the nature of such proceedings on which it is based must be stated.

G. That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

H. That all papers in duplicate have been compared with each other and are, in all respects, exact counterparts.

I. Whether the offense charged is a felony or a misdemeanor, with a concise definition thereof, and a particular reference to the statute, giving chapter, title, article, page and section, together with any amendments thereto, defining the offense and stating the punishment thereof.

J. When more than one year has elapsed since the commission of the crime, a full explanation must be given, and upon an application where no indictment has been found, the reasons therefor must be stated.

1. In cases of false pretenses, embezzlement or forgery, and all offenses known as such prior to the enactment of the Penal Code, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes.

2. Proof by affidavit by *facts and circumstances* satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. No mere unsupported allegation will be received or accepted as conclusive upon this point. In addition to the *facts and circumstances* required, it must affirmatively appear what the occupation of the accused at the time of flight was; whether he was a resident or only in the state transiently; whether he was married; when the alleged fugitive left the state; and in general the previous history of the accused so far as it can be ascertained—in short, the affiant's reasons for his belief that the accused is a fugitive from justice, and whether he is in the surrendering state transiently or making it his residence, and his occupation therein. If the affidavit be not made by the district attorney or some public officer, the district attorney must certify that the affiant is a respectable person and entitled to credit.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found the *facts and circumstances* showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by depositions taken before a *magistrate* (a notary public is not a magistrate within the meaning of the statutes) in support of an information which must always be furnished in such case, and no application will be received or considered which is based on an information standing by itself. Conclusions will not be considered except in connection with the facts and circumstances from which they are drawn.

5. If the crime of forgery is charged, an affidavit of the person whose name is alleged to have been forged, must be produced, or its absence satisfactorily explained.

6. If the crime charged is seduction, corroborative evidence must be furnished by affidavit of one or more witnesses taken before a magistrate, whether an indictment has been found or not.

7. Except as to the whereabouts of the accused, the sources of information and belief stated, must be given, and the reason why such information is not verified by the person possessing it stated.

8. It should be shown that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, must be furnished upon an application.

9. In all cases of extradition where the fugitive is beyond the jurisdiction of the United States, the application must, in the first instance, be presented to the Governor. All such papers must be presented in *triplicate*, and conform to the foregoing rules. The triplicate copies must each be certified by the *magistrate*, and must each contain a copy of the information, of the depositions in support thereof, and of a *warrant* issued thereon against the accused for the offense charged. Triplicate copies of *all* papers are absolutely necessary. In foreign countries indictments are not recognized and are absolutely useless.

In Canadian extradition each of the three sets of the papers required must contain one of the three triplicate copies of the information, depositions and one of the three *triplicate original* warrants issued thereupon; also each original warrant must be accompanied by a copy of itself and all certified in the form given on page 145, 6 Moak's English Reports. Follow closely the practice given in this volume, pages 144-147.

A copy of the rules governing United States extradition will be furnished on application to the State Department at Washington.

10. Applications will not be considered unless it affirmatively appears the alleged fugitive was in this state at the time of the commission of the offense. Constructive crime is not within the extradition laws.

11. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrants must be duly certified.

12. The district attorney asking a requisition must, within six months, unless sooner required, after it is issued, make a return accompanied by the affidavit of the agent named therein, fully stating all proceedings had thereunder and upon the information or indictment on which the same was based.

13. The Governor of this state will deliver over to the executive of any other state or territory, persons charged therein with crime, only when the demand is accompanied by documents and proofs which are in accordance with the extradition laws.

14. Upon the renewal of an application, for example, on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new papers in conformity with the above rules must be furnished.

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